

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK and AMANDA ST. PIERRE,

Defendants.

Civil Action No. 1:08-cv-177

NOTICE OF LODGING PROPOSED CONSENT DECREE

Plaintiff United States of America hereby lodges with the Court a proposed Consent Decree which, if entered, would fully resolve the United States' claims in this case. The United States requests that the Court take no action on the proposed Consent Decree at this time. Pursuant to 28 C.F.R. § 50.7, the proposed Consent Decree will be available for public comment for 30 days following publication of notice in the Federal Register. When the comment period expires, the United States will notify the Court and move for an appropriate Order concerning the proposed Consent Decree.

Respectfully submitted,

UNITED STATES OF AMERICA

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Dated: September 3, 2008 By: /s/ Michael P. Drescher
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CONSENT DECREE

WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed the Complaint herein against Defendants Mark and Amanda St. Pierre (collectively, "Defendants"), alleging that Defendants violated Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a);

WHEREAS, the Complaint alleges that Defendants violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States at various sites located in the towns of Richford and Berkshire, Franklin County, Vermont (the "Sites") and more fully described in the Complaint, without authorization by the United States Department of the Army Corps of Engineers ("the Corps");

WHEREAS, the Complaint seeks (1) to enjoin the discharge of pollutants into waters of the United States in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); (2) to require Defendants, at their own expense and at the direction of EPA, to restore and/or mitigate the

damages caused by their unlawful activities; and (3) to require Defendants to pay civil penalties as provided in 33 U.S.C. § 1319(d);

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims under the CWA set forth in the Complaint regarding the Sites;

WHEREAS, the United States and Defendants agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' claims under the CWA against Defendants in this case;

WHEREAS, Defendants represent that they have individually read this Consent Decree and understand its terms; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' claims against Defendants in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of these actions and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the District of Vermont pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because the Defendants conduct business in

this District, the subject property is located in this District, and the causes of action alleged herein arose in this District.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344.

II. APPLICABILITY

4. The obligations of this Consent Decree, its Appendices, and the approved work plans referenced in the Appendices (hereinafter referred to collectively as the "Consent Decree") shall apply to and be binding upon Defendants, their officers, directors, agents, heirs, employees and servants, and their successors and assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with any of the Defendants whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against a Defendant, the Defendant shall not raise as a defense the failure of any of its officers, directors, agents, heirs, employees, successors or assigns or any person, firm or corporation acting in concert or participation with the Defendant, to take any actions necessary to comply with the provisions hereof.

5. The transfer of ownership or other interest in the Sites, as described in Paragraphs 32, 37, 42 and 47 of the Complaint, and the transfer of ownership or other interest in any other areas that are subject to the restoration, mitigation, or Supplemental Environmental Project requirements of this Consent Decree and its appendixes, separately or in combination, shall not alter or relieve Defendants of their obligation to comply with all of the terms of this Consent Decree. At least thirty (30) days prior to the transfer of ownership or other interest in the Sites, or any other areas that are subject to the restoration, mitigation, or Supplemental Environmental

Project requirements of this Consent Decree and its appendixes, the Defendant(s) making such transfer shall provide written notice and a true copy of this Consent Decree to its/their successor/s in interest and shall simultaneously notify EPA and the United States Department of Justice at the addresses specified in Section XI below that such notice has been given. As a condition to any such transfer, the Defendant making the transfer shall reserve all rights necessary to allow the Defendant to comply with the terms of this Consent Decree.

III. SCOPE OF CONSENT DECREE

6. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Complaint against the Defendants under CWA Section 301 concerning the Sites.

7. It is the express purpose of the parties in entering this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251. All plans, studies, construction, remedial maintenance, monitoring programs, and other obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing Defendants to achieve and maintain full compliance with, and to further the purposes of, the CWA.

8. Defendants' obligations under this Consent Decree are joint and several.

9. Except as in accordance with this Consent Decree, Defendants and Defendants' agents, successors and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations, including (but not limited to) any individual or general permit which may be required under CWA section 404, 33 U.S.C. § 1344.

10. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the United States Army Corps of Engineers to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

11. This Consent Decree in no way affects or relieves Defendants of their responsibility to comply with any applicable federal, state, or local law, regulation or permit.

12. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

13. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

14. Except as provided in Paragraphs 1, 2 and 3, nothing in this Consent Decree shall constitute an admission of any issue of fact or law, by any party.

IV. SPECIFIC PROVISIONS

CIVIL PENALTIES

15. Defendants shall pay a civil penalty to the United States, in the amount of \$10,000, within 30 days of entry of this Consent Decree. In the event that the Defendants serve notice to the United States, pursuant to Paragraph 31, of their decision to neither implement the Supplemental Environmental Project described in Section V of this Consent Decree nor implement an alternative preservation plan pursuant to Paragraph 25, Defendants shall pay an

additional civil penalty in the amount of \$31,000, within thirty (30) days from the date they serve said notice.

16. Defendants shall make the above-referenced payments by certified check payable to the "Treasurer of the United States," or by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number (2005V00023) and EPA, New England Region, and the DOJ case number (DJ # 90-5-1-1-17229/1). Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of Vermont. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

17. Upon payment of the civil penalties required by this Consent Decree, Defendants shall provide written notice, at the addresses specified in Section XI of this Consent Decree, that such payment was made in accordance with Paragraph 16.

18. Civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section X) are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law. In the event that a civil or stipulated penalty payment is not made on time, interest will be charged in accordance with the statutory judgment rate provided for in 28 U.S.C. § 1961 from the time the payment is due until such payment is made. Interest shall be computed daily and compounded annually.

RESTORATION AND MITIGATION

19. Defendants shall perform wetland restoration and compensatory mitigation projects under the terms and conditions stated in Appendix I appended hereto and in accordance with the Restoration and Mitigation Work Plans ("Work Plans") approved thereunder, all of which are incorporated herein by reference. The parties acknowledge and agree that the objective of such restoration and mitigation projects is to restore and replace the lost ecological functions and values of the filled and disturbed wetlands and stream described in the Complaint.

20. Upon completion of the terms and conditions of Appendix I, Defendants shall not mow, cut, clear, cultivate, plow, dredge, excavate, farm, fill, dewater, drain or otherwise disturb in any manner whatsoever any of the wetlands and other waters of the United States that the Defendants have restored at the wetland restoration and mitigation areas identified in Appendix I, except as provided below, or as approved by EPA in advance in writing and, as necessary, authorized in advance by the Corps.

21. Areas identified in Appendix I that are not subject to restoration may be utilized for the production and harvesting of hay. Areas identified in Appendix I that are not subject to restoration may not be utilized for the production of corn or other crops and may not be disturbed in any manner described in Paragraph 20 except for the production and harvesting of hay. Areas identified in Appendix I that are not subject to restoration shall not be treated with fertilizers or pesticides, nor utilized for manure spreading.

22. Defendants shall, within fifteen (15) days of entry of this Consent Decree, file a Notice with abstract summarizing the requirements of this Consent Decree with the Town Clerks of Richford and Berkshire, Vermont. Defendants shall provide a copy of their Notice and

abstract to EPA for review and approval no later than thirty (30) days prior to filing. Thereafter, each deed, title, or other instrument conveying an interest in any property identified in Appendix I shall contain a notice stating that the property is subject to this Consent Decree and shall reference the locations of the Notice and abstract and any restrictions applicable to the property under this Consent Decree. Defendants shall also provide the United States with copies of such filed Notice and abstract. Following the termination of this Consent Decree, in accordance with Section XVI, Defendants may file a notice with the Town Clerks of Richford and Berkshire, Vermont, certifying that the requirements of the Consent Decree have been fulfilled and the Consent Decree terminated.

V. SUPPLEMENTAL ENVIRONMENTAL PROJECT

23. Defendants shall complete a Supplemental Environmental Project ("SEP"), at the locations shown in Attachments 3 and 4 of Appendix II, attached hereto and incorporated herein by reference. The SEP is intended to secure significant environmental benefits and consists of (a) restoration and preservation of wetlands adjacent to one of the Sites, comprising approximately 9.4 acres and known as the "Preservation Areas," and (b) the protection of the Preservation Areas through a conservation easement or (in the event that the parties mutually agree that a conservation easement is not feasible) a conservation declaration. Defendants shall grant a conservation easement enforceable under Vermont law in favor of a governmental or not-for-profit entity ("Entity"), approved in writing by EPA, which has, as one of its principal purposes, the preservation of undeveloped land. All parties to this Consent Decree anticipate that the Entity to which the conservation easement shall be granted is the Franklin County Natural Resources Conservation District, authorized and formed pursuant to the Vermont Soil

Conservation Act. Defendants may choose to grant the easement to a different qualified Entity provided that such Entity and the terms of the easement are approved in writing by EPA in advance.

24. Restoration under the SEP shall be performed in accordance with the requirements and deadlines contained in the "SEP Work Plan" specified in Appendix II. All work performed in accordance with Appendix II shall be satisfactorily completed no later than October 15, 2009. Based on information provided by the Defendants, the United States has concluded that the value of the SEP equals or exceeds \$31,000.

25. If, within ninety (90) days after commencement of restoration activities in accordance with the approved work plans and schedule required by Appendix II, the Defendants determine that it is not feasible to restore the Preservation Area, the Defendants may propose to restore and preserve an alternate wetland area of equal or greater ecological value to the watershed areas within which the Sites are located, consistent with EPA's May 1, 1998 Supplemental Environmental Projects Policy. For purposes of this paragraph, the watershed areas within which the Sites are located are the Missisquoi and Pike River watersheds. Any such proposal shall be submitted to the United States for review and approval within one hundred and fifty (150) days after entry of this Consent Decree by the Court. The proposal shall be detailed and comprehensive and shall at a minimum (1) specify the location and size of the alternate preservation area; (2) describe the recent past and current uses of the alternate preservation area; (3) describe what, if any, restoration is required to return such area to its natural state and how such restoration would be implemented; (4) describe the ecological values of the alternate preservation area; (5) state the name, address, and status (governmental or not-for-profit) of the

proposed easement holder; and (6) the time frame for implementation. Within sixty (60) days from its receipt of a timely proposal containing the information required by this paragraph, EPA will exercise reasonable efforts to approve or disapprove the proposal. If EPA approves the proposal in writing, Defendants shall prepare and implement a revised SEP work plan in accordance with Appendix II. If EPA disapproves the proposal in writing, Defendants shall pay an additional civil penalty in the amount of \$31,000, within thirty (30) days from the date they receive notice of EPA's disapproval.

26. Defendants shall grant the conservation easement in a form enforceable under Vermont law, and generally in the form provided in Appendix III, and shall record such conservation easement with the Town Clerk of Richford, Vermont (or other appropriate recorder's office) within 13 months after entry of this Consent Decree by the Court, unless the United States has agreed in writing to an extension of the time for granting and recording of the easement. Defendants shall submit a draft conservation easement agreement to EPA for review and approval within six months from commencement of the SEP restoration. Defendants shall mail a copy of the final conservation easement for the SEP to EPA within sixty (60) days of its recording.

27. Defendants hereby certify that, as of the date of this Consent Decree, they are not required to perform the SEP under any other federal, state, local law or regulation. Defendants certify that they are not required to perform the SEP as a consequence of any other agreement to which Defendants are party, that they have not received, and are not currently negotiating to receive, credit in any other enforcement action for the SEP, and that they are not receiving and will not receive federal funds for the implementation of the SEP.

28. Defendants hereby agree that any written or oral public statement made by them or on their behalf, making reference to the SEP, shall include the following language: "This Project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency in which that agency alleged violations of the Clean Water Act."

29. For Federal Income Tax purposes, Defendants agree that they will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP. In addition, for each tax year that costs are incurred by Defendants for the SEP, a qualified representative of the Defendants responsible for tax preparation (other than the Defendants) shall, within thirty (30) days of the date Defendants (jointly or individually) submit their Federal tax for any tax year in which SEP costs are incurred, submit a signed statement to EPA certifying that the expenses were neither so capitalized into inventory or basis nor so deducted. The certification shall state:

Under the pains and penalties of perjury, I declare that I have examined Mark and Amanda St. Pierre's tax return(s) pertaining to the year 20___. To the best of my knowledge and belief, these tax returns do not contain a capitalization into inventory or basis, or the deduction or depreciation, for any supplemental environmental project expenses Mark and Amanda St. Pierre have incurred, nor have Mark and Amanda St. Pierre received a tax credit from either the federal or state government for any of those expenses.

30. In the event that the parties mutually agree at any time that it is not feasible for Defendants to complete the SEP through the granting of a conservation easement, the Parties agree that the Preservation Areas will be encumbered by a Declaration of Conservation Conditions and Restrictions ("Declaration") (in the form attached as Appendix IV). The United States shall confirm the parties' mutual agreement regarding the use of a Declaration to achieve

the purposes of the SEP by supplying Defendants with prompt written notice. The Declaration shall prevent any impairment or interference with the conservation and water quality values of the Preservation Areas and Defendants shall comply with all of the conditions and restrictions identified in the Declaration. Defendants shall execute and record a certified copy of the Declaration with the Town Clerk of Richford, Vermont (or other appropriate recorder's office) within thirty (30) days from the date of Defendants' receipt of notice under this paragraph.

31. Defendants may, at any time, provide written notice to the United States that they no longer intend to implement the SEP. Upon Defendants' mailing of such notice, Defendants shall pay the additional civil penalty prescribed in Paragraph 15, except as provided in Paragraph 25 (proposal to restore and preserve an alternative wetland area).

32. Defendants shall submit a SEP Completion Report to EPA within sixty (60) days following the completion of all tasks required to implement the SEP. The SEP Completion Report shall contain the following information:

- (a) A detailed description of the SEP as implemented;
- (b) A description of any implementation problems encountered and the solutions thereto; and
- (c) Certification that the SEP has been fully implemented pursuant to the provisions of this Consent Decree.

33. If Defendants fail, by thirty (30) days or more, to complete restoration as required by the SEP Work Plan in accordance with the deadline(s) established in Appendix II, or grant the conservation easement in accordance with the deadline established by Paragraph 26, and thereafter fail to meet such requirements in accordance with a schedule approved by EPA in

writing, then EPA may in its discretion notify Defendants in writing that they have failed to adequately perform the SEP and must cease work under the SEP and pay the stipulated penalty described in Paragraph 52(i). If the Defendants disagree with any notice provided under this paragraph, they may submit a written notice of dispute to EPA pursuant to Section VIII (Dispute Resolution); however, if Defendants have failed to complete restoration or grant the conservation easement by the deadlines established in Appendix II and the SEP Work Plan by ninety (90) or more days, then they may not use the Dispute Resolution procedure to challenge any notice provided under this paragraph, and shall pay the stipulated penalty in accordance with this paragraph.

34. After receipt of the SEP Completion Report described in Paragraph 32, EPA will, in writing, either (i) indicate that EPA concludes that the SEP complies with the requirements of this Consent Decree; (ii) notify Defendants that the SEP or the SEP Completion Report do not comply with the requirements of this Consent Decree and specify a schedule for correction of either the SEP or the SEP Completion Report; or (iii) determine that the SEP does not comply with the requirements of this Consent Decree and notify Defendants of their obligation to pay stipulated penalties in accordance with Paragraph 52(i). If EPA notifies Defendants pursuant to clause (ii) above that the SEP Completion Report does not comply with the requirements of this Consent Decree, but EPA has not yet made a final determination as to whether the SEP itself complies with the requirements of this Consent Decree, Defendants shall modify the SEP Completion Report in accordance with the schedule specified by EPA. If EPA notifies Defendants pursuant to clause (ii) above that the SEP itself does not comply with the requirements of this Consent Decree, Defendants shall correct the SEP in accordance with the

schedule specified by EPA, unless within thirty (30) days of its receipt of the EPA notification, Defendants submit a written notice of dispute to EPA pursuant to Section VIII (Dispute Resolution).

35. Failure to submit or modify any report required by this Section, or perform any corrections needed to ensure that the SEP complies with the requirements of this Consent Decree, shall be a violation of this Consent Decree and Defendants shall be liable for stipulated penalties pursuant to Paragraph 52.

36. A determination by EPA that a SEP does not comply with the requirements of the Consent Decree under Paragraph 34, clause (iii) above, shall be final unless within thirty (30) days of its receipt of the EPA notice Defendants submit a written notice of dispute to EPA pursuant to Section VIII (Dispute Resolution).

VI. NOTICES AND OTHER SUBMISSIONS

37. In addition to the SEP Completion Report required by Paragraph 32, above, on April 30, July 31, and October 31 of each year following entry of the Consent Decree, and continuing until all construction work, including all planting activities, is completed, Defendants shall provide the United States with written progress reports, at the addresses specified in Section XI of this Consent Decree, regarding the Wetland Restoration, Compensatory Mitigation, and SEP Projects. The reports shall describe tasks underway or completed to date, a schedule for tasks that the Defendants will undertake during the following three months, tasks remaining to be performed, any anticipated problems that may delay or interfere with completion of the tasks, and other pertinent information. If the required task has been completed, the report shall specify the

date when it was completed. If the required task has not been completed, the report shall explain the reasons for the delay and state the date on which the task will be completed.

38. Following completion of all construction work, including all planting activities, Defendants shall provide the United States with monitoring reports in accordance with the requirements in Appendix I, B.3; Appendix I, C.5; and Appendix II, B.3 to the Consent Decree.

39. In all notices, documents or reports submitted to the United States pursuant to this Consent Decree, at least one of the Defendants shall certify such notices, documents and reports as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

VII. RETENTION OF RECORDS AND RIGHT OF ENTRY

40. Until termination of this Consent Decree, Defendants shall preserve and retain all records and documents now in their possession or control or which come into their possession or control that relate in any manner to the performance of the tasks in Appendix I and II. Until termination of this Consent Decree, Defendants shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the tasks in Appendix I and II.

41. At the conclusion of the document retention period, Defendants shall notify the United States at least 90 days prior to the destruction of any such records or documents, and,

upon request by the United States, Defendants shall deliver any such records or documents to EPA. The Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Defendants assert such a privilege, they shall provide the United States with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

42. A. Until termination of this Consent Decree, the United States and its authorized representatives and contractors shall have authority at all reasonable times to enter the Defendants' premises to:

- 1) Monitor the activities required by this Consent Decree;
 - 2) Verify any data or information submitted to the United States;
 - 3) Obtain samples;
 - 4) Inspect and evaluate Defendants' restoration, mitigation, and SEP activities;
- and
- 5) Inspect and review any records required to be kept under the terms and conditions of this Consent Decree and the CWA.

B. This provision of this Consent Decree is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States to conduct inspections, to require monitoring and to obtain information from the Defendants as authorized by law.

VIII. DISPUTE RESOLUTION

43. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and Defendants affected by the dispute to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless an extension is agreed to in writing by those parties. If a dispute between the United States and Defendants cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within fourteen (14) days after the end of the informal negotiations period, the Defendants file a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree and the CWA, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

44. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for

informal negotiations. The Defendants shall have fourteen (14) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

45. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendants under this Consent Decree, except as provided in Paragraph 55 below regarding payment of stipulated penalties.

IX. FORCE MAJEURE

46. Defendants shall perform the actions required under this Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Defendants, including their employees, agents, consultants and contractors, which could not be overcome by due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time period. A Force Majeure event does not include, inter alia, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or normal climate events, or changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of a site. A Force Majeure event also does not include Defendants' failure to obtain federal, state or local permits or approvals, unless Defendants demonstrate that they have submitted timely and complete applications and have taken all other actions necessary to obtain all such permits or approvals.

47. If Defendants believe that a Force Majeure event has affected Defendants' ability to perform any action required under this Consent Decree, Defendants shall notify the United States in writing within fourteen (14) calendar days after the discovery of the event at the U.S. Mail addresses listed in Section XI. Timely notice of the event may be delivered to the United States by electronic mail, at the electronic mail addresses listed in Section XI, provided that a physical hard copy of such electronic mail is promptly sent to the U.S. Mail addresses listed in Section XI. Such notice shall include a discussion of the following:

- A. what action has been affected;
- B. the specific cause(s) of the delay;
- C. the length or estimated duration of the delay; and
- D. any measures taken or planned by the Defendants to prevent or minimize the delay and a schedule for the implementation of such measures.

Defendants may also provide to the United States any additional information that they deem appropriate to support their conclusion that a Force Majeure event has affected their ability to perform an action required under this Consent Decree. Failure to provide timely and complete notification to the United States shall constitute a waiver of any claim of Force Majeure as to the event in question.

48. If the United States determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event. Defendants shall coordinate with EPA to determine when to begin or resume the operations that had been affected by any Force Majeure event.

49. If the parties are unable to agree whether the conditions constitute a Force Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at issue should be extended, any party may seek a resolution of the dispute under the procedures in Section VIII of this Consent Decree.

50. Defendants shall bear the burden of proving (1) that the noncompliance at issue was caused by circumstances entirely beyond the control of Defendants and any entity controlled by Defendants, including their contractors and consultants; (2) that Defendants or any entity controlled by Defendants could not have foreseen and prevented such noncompliance; and (3) the number of days of noncompliance that were caused by such circumstances.

X. STIPULATED PENALTIES

51(i). Unless excused pursuant to the provisions of Section IX (Force Majeure), Defendants shall incur the following stipulated penalties for failure to comply with any requirement prescribed by Paragraphs 19, 20 and 21 of this Consent Decree, and any requirement of Appendix I to this Consent Decree, including any milestone set forth in the Work Plans required by Appendix I:

- | | | |
|----|---|------------------|
| A. | For Day 1 up to and including
Day 30 of non-compliance | \$100.00 per day |
| B. | For Day 31 up to and including
60 of non-compliance | \$300.00 per day |
| C. | For Day 61 and beyond
of non-compliance | \$600.00 per day |

(ii). Unless excused pursuant to the provisions of Section IX (Force Majeure), Defendants shall incur the following stipulated penalties for failure to comply with any other

requirement of this Consent Decree not identified in Paragraph 51(i) above, other than Paragraph 15 (Civil Penalties) and Section V (Supplemental Environmental Project):

- | | | |
|----|---|------------------|
| A. | For Day 1 up to and including
Day 30 of non-compliance | \$100.00 per day |
| B. | For Day 31 up to and including
60 of non-compliance | \$200.00 per day |
| C. | For Day 61 and beyond
of non-compliance | \$300.00 per day |

52. In the event that EPA determines that Defendants have failed to comply with any of the terms or provisions of Section V (including any deadlines and milestones established in or under Appendix II to this Consent Decree), and notifies Defendants of such failure in writing, Defendants shall be liable for stipulated penalties according to the provisions as set forth below:

(i) If, pursuant to Paragraph 33 or Paragraph 34 (iii), the United States determines and notifies the Defendants that the Defendants have failed to adequately perform the SEP or that the SEP does not comply with the requirements of this Consent Decree, respectively, Defendants shall pay a stipulated penalty in the amount of \$31,000 to the United States, subject to the outcome of any Dispute Resolution procedure which may be initiated by the Defendants in accordance with Section VIII of this Consent Decree. Any stipulated penalties paid pursuant to subparagraphs 52 (ii) or (iii) below shall be credited towards the \$31,000 stipulated penalty paid pursuant to this subsection.

(ii) Defendants shall pay a stipulated penalty of \$100 per day for each day that they are late in completing the SEP, subject to the outcome of any Dispute Resolution procedure which may be initiated by the Defendants in accordance with Section VIII of this Consent Decree.

(iii) For failure to mail a copy of the conservation easement, submit the SEP Completion Report, or cure deficiencies as required by Paragraph 34 above, Defendants shall pay a stipulated penalty of \$100 per day for each day that Defendants are late in mailing the copy, submitting the report or curing the deficiencies, subject to the outcome of any Dispute Resolution procedure which may be initiated by the Defendants in accordance with Section VIII of this Consent Decree.

53. Stipulated penalties shall automatically begin to accrue on the first day the Defendants fail to satisfy any obligation or requirement of this Consent Decree and shall continue to accrue through the final day of the correction of the noncompliance. Stipulated penalties shall be paid no later than 30 days from the date of the United States' written demand for payment. Method of payment shall be in accordance with the provisions of Paragraph 58 below. Interest shall be paid as stated in Paragraph 57 below. The United States may, in its unreviewable discretion, waive or reduce the amount of any stipulated penalty that has accrued.

54. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section VIII and/or the Force Majeure provisions in Section IX shall be resolved upon motion to this Court as provided in Paragraphs 43 and 44.

55. The filing of a motion requesting that the Court resolve a dispute shall stay Defendants' obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or

condition of this Consent Decree. In the event that Defendants do not prevail on the disputed issue, stipulated penalties shall be paid by Defendants as provided in this Section.

56. To the extent Defendants demonstrate to the Court that a delay or other non-compliance was due to a Force Majeure event (as defined in Paragraph 46 above) or otherwise prevail on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

57. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

58. Defendants shall make any payment of a stipulated penalty by certified check payable to the "Treasurer of the United States," or by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number (2005V00023), and EPA, New England Region, and the DOJ case number (DJ # 90-5-1-1-17229/1). Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of Vermont. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendants shall provide written notice, at the addresses specified in Section XI of this Decree.

XI. ADDRESSES

59. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO EPA:

- (1) Ann Williams, Esq.
Senior Assistant Regional Counsel
United States Environmental Protection Agency
Office of Regional Counsel, Region I
Mail Code RAA
One Congress Street, Suite 1100
Boston, MA 02114-2023
(617) 918-1097
Williams.Ann@epamail.epa.gov
- (2) Dan Arsenault
United States Environmental Protection Agency
Region I, Mail Code CMP
One Congress Street, Suite 1100
Boston, MA 02114
(617) 918-1562
Arsenault.Dan@epamail.epa.gov

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE

Chief, Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
Re: DJ # 90-5-1-1-17229/1

D. TO DEFENDANTS:

Mark and Amanda St. Pierre
1546 Richford Road
Richford, Vermont 05476-9733

XII. COSTS OF SUIT

60. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should Defendants subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, including any requirements associated with Section V (Supplemental Environmental Project), Defendants shall be liable for any costs or reasonable attorneys' fees incurred by the United States in any action against Defendants for noncompliance with or enforcement of this Consent Decree.

XIII. PUBLIC COMMENT

61. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified the Defendants in writing that it no longer supports entry of the Consent Decree.

XIV. CONTINUING JURISDICTION OF THE COURT

62. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During

the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

XV. MODIFICATION

63. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. All modifications of this Consent Decree shall be in writing. With the exception of modifications of the Work Plans prepared in accordance with Appendices I and II, any modification of this Consent Decree shall not take effect unless signed by both the United States and the Defendants and, in the case of material modifications, approved by the Court.

XVI. TERMINATION

64. With the exception of the permanent injunction required by Paragraph 20, this Consent Decree may be terminated by either of the following:

A. Defendants and the United States may at any time make a joint motion to the Court for termination of this Decree or any portion of it; or

B. Defendants may make a unilateral motion to the Court to terminate this Decree after all of the following have occurred:

1. Defendants have obtained and maintained compliance with all provisions of this Consent Decree, including its Appendices, and the CWA for twelve (12) consecutive months;

2. Defendants have paid all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;

3. Defendants have certified compliance pursuant to subparagraphs 1 and 2 above to the Court and all Parties; and

4. Within forty-five (45) days of receiving such certification from the Defendants, EPA has not contested in writing that such compliance has been achieved. If EPA disputes Defendants' full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the Parties or the Court.

IT IS SO ORDERED.

Dated and entered this _____ day of _____ 2008.

United States District Judge

ON BEHALF OF THE UNITED STATES:

RONALD J. TENPAS
Assistant Attorney General
Environment and Natural Resources Division

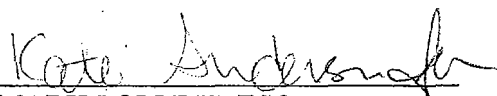
Joshua M. Levin, Esq.
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

Dated: _____

THOMAS D. ANDERSON
United States Attorney
District of Vermont

Michael P. Drescher
Assistant U.S. Attorney
P.O. Box 570
Burlington, VT 05402-0570
(802) 951-6725

Dated: _____



MARK POLLINS, ESQ.

Dated: 8/18/08

Director, Water Enforcement Division
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

Susan Studlien
SUSAN STUDLIEN, Director
Office of Environmental Stewardship
United States Environmental Protection Agency
Mail Code SAA
One Congress Street, Suite 1100
Boston, MA 02114-2023

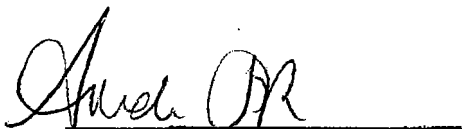
Dated: 08/08/08

MARK AND AMANDA ST. PIERRE



Mark St. Pierre
1546 Richford Road
Richford, Vermont 05476-9733

Dated: 6/29/08



Amanda St. Pierre
1546 Richford Road
Richford, Vermont 05476-9733

Dated: 6/29/08

APPENDIX I
GENERAL SCOPE OF WORK FOR WETLAND RESTORATION
AND COMPENSATORY MITIGATION

A. GENERAL PROVISIONS

1. This Appendix generally describes the activities comprising wetland restoration and mitigation projects referred to in Section IV of the Consent Decree in the matter of United States v. Mark and Amanda St. Pierre (D. VT) ("Consent Decree"). It provides an outline for the restoration and monitoring work to be performed on Tracts 10264, 1043, 9970, and 9424 and the compensatory mitigation and monitoring work to be performed on Tract 9970, Field Nos. 12 and 7.

2. The goal of the restoration and compensatory mitigation work described in this Appendix is to return identified areas to wetland so that within each restoration and compensatory mitigation area the following conditions are met:

- a. A predominance (greater than 50%) of plant species with a wetland indicator status of facultative, facultative-plus, facultative-wet, or obligate;
- b. Hydric soils; and
- c. Soil saturation at or near the soil surface for 5% of the growing season.

3. All notices, reports, and other documents required herein, except for notices under Section D below, shall be submitted to the following address:

Dan Arsenault
United States Environmental Protection Agency
Region I, Mail Code CMP
One Congress Street, Suite 1100
Boston, MA 02114
(617) 918-1562
Arseault.Dan@epamail.epa.gov

B. RESTORATION WORK PLAN

1. Within sixty (60) calendar days of the lodging of the Consent Decree, the Defendants shall provide to EPA a draft detailed work plan ("Restoration Work Plan") for performing the wetland restoration work and the monitoring activities specified below. All provisions and specifications in the Restoration Work Plan shall conform, to the extent appropriate and applicable, to the U.S. Army Corps of Engineers - New England District Mitigation Plan Checklist and Guidance (Attachment 1).

a. On Tract 10264, Field UN-8, approximately 1.36 acres of wetland shall be restored. Refer to Attachment 2 for wetland restoration location. The work to be performed shall be designed to achieve the restoration goals described in Section A and shall include but need not be limited to the following:

(1) All areas of exposed soil within the restoration area shall be seeded with an herbaceous wetland seed mixture.

(2) Any drainage structures within the restoration area shall be permanently disabled.

(3) Coarse woody debris shall be spread over three to five percent of the restoration area;

(4) The entire restoration area shall have at least a 6 inch layer of loamy top soil prior to seeding and the spreading of coarse woody debris.

(5) All appropriate erosion and sedimentation controls shall be implemented and maintained to prevent the deposit of sediments into wetlands and all other surface waters.

(6) The perimeter of the restoration area that borders active agricultural fields shall be marked with permanent visual demarcations to prevent encroachment upon the restoration area.

(7) All restoration work shall be completed by October 15 of the year during which restoration is being performed.

b. On Tract 1043, Fields UN-3 and UN-4, approximately 1.3 and 2.6 acres, respectively, of wetland shall be restored. Refer to Attachments 3 and 4 for wetland restoration locations. The work to be performed shall be designed to achieve the restoration goals described in Section A and shall include but need not be limited to the following:

(1) All areas of erosion above the restoration areas shall be stabilized and repaired to prevent further migration of sediment to the restoration areas and the Missisquoi River.

(2) Areas of eroded sediment deposit within the restoration areas shall be removed down to the original soil surface.

(3) All areas of ditching shown on Attachments 3 and 4 shall be filled in and compacted back to the level of the surrounding areas.

(4) Any drainage structures within the restoration area shall be permanently disabled.

(5) All areas of exposed soil within the restoration areas shall be seeded with an herbaceous wetland seed mixture.

(6) Coarse woody debris shall be spread over three to five percent of each restoration area.

(7) Each restoration area in its entirety shall have at least a 6 inch layer of loamy top soil prior to seeding and the spreading of coarse woody debris.

(8) All appropriate erosion and sedimentation controls shall be implemented and maintained to prevent the deposit of sediments into wetlands and all other surface waters.

(9) All restoration work shall be completed by October 15 of the year during which restoration is being performed.

c. On Tract 9970, Field UN-2, approximately 7.22 acres of wetland shall be restored. Additionally, ditching on the northern edge of Field UN-4 shall be filled in and compacted to the level of adjacent areas. Refer to Attachments 5 and 6 for wetland restoration locations. The work to be performed shall be designed to achieve the restoration goals described in Section A and shall include but need not be limited to the following:

(1) The spoil pile along the northern edge of the impact area on Field UN-2, shown on Attachment 5, shall be evenly spread around the 7.22 acre impact area;

(2) Any drainage structures within the restoration area shall be permanently disabled.

(3) Ditch repair shall consist of filling and compacting the ditch located along the northern boundary of Field 4, as shown on Attachment 6. The ditch shall be filled to the elevation of adjacent lands;

(4) All areas of exposed soil within the restoration areas shall be seeded with an herbaceous wetland seed mixture.

(5) All appropriate erosion and sedimentation controls shall be

implemented and maintained to prevent the deposit of sediments into wetlands and all other surface waters.

(6) All restoration work shall be completed by October 15 of the year during which restoration is being performed.

d. On Tract 9424, approximately 15.68 acres of wetland shall be restored. For purposes of the Consent Decree, Tract 9424 is divided into three areas, 9424 North (Attachment 7), 9424 South (Attachment 8), and 9424 Field UN-18 (Attachment 9). Refer to Attachments 7, 8, and 9 (cross hatched areas) for wetland restoration locations. The work to be performed shall be designed to achieve the restoration goals described in Section A and shall include but need not be limited to the following:

(1) All areas of fill, inclusive of spoil piles and those areas graded to create agricultural fields, shall be removed and the restoration areas returned to their original grade;

(2) All areas of exposed soil shall be seeded down with an herbaceous wetland seed mixture;

(3) Any drainage structures within the restoration areas shall be permanently disabled.

(4) Coarse woody debris shall be spread over three to five percent of each restoration area;

(5) The perimeter of the restoration areas that are adjacent to active crop lands shall be planted with hydrophytic trees at 50 foot intervals;

(6) A woody buffer consisting of hydrophytic shrubs shall be planted along

those restoration areas adjacent to Godin Brook;

(7) Work along Godin Brook shall be performed between July 1 and August 31;

(8) Each restoration area in its entirety shall have at least a 6 inch layer of loamy top soil prior to seeding and the spreading of coarse woody debris;

(9) All appropriate erosion and sedimentation controls shall be implemented and maintained to prevent the deposit of sediments into wetlands, Godin Brook, and all other surface waters;

(10) All restoration work shall be completed by October 15 of the year during which restoration is being performed.

2. Wetland restoration shall be completed in accordance with a schedule to be set out in the approved Restoration Work Plan. All restoration shall be completed no later than October 15, 2011. The Defendants shall perform the work in the following sequence:

- 2008 - Repair erosion problems on Tract 1043, as specified in Paragraph B.1.(b)(1) above, and in conjunction with the repair of the erosion problems in the SEP areas (see Appendix II, Paragraph B.1.b.(1)).
 - Perform restoration work on Tract 10264.
- 2009 - Perform restoration work in Fields UN-3 and UN-4 on Tract 1043, as specified in Paragraphs B.1.b.(2)-(9) above.
 - Restore the ditch along the northern edge of Field UN-4 on Tract 9970.

- 2010 - Perform restoration work on Tract 9424 along Godin Brook shown on Attachment 8, within the 6.11 acre impact area.
- 2011 - Perform all remaining restoration work.

The Defendants may choose to accomplish restoration work in a shorter time frame provided that all provisions of the Restoration Work Plan are complied with.

3. For Tracts 10264, 1043, and 9424, the Defendants shall develop and undertake a five (5) year monitoring program consistent, as appropriate and applicable, with the monitoring provisions in Attachment 1, to assess the success of the restoration areas in relation to the mitigation goals outlined in Paragraph A.2. above. Monitoring for restoration work completed in 2008 shall begin in 2009. Monitoring for restoration work completed in 2009 shall begin in 2010. Monitoring for restoration work completed in 2010 shall begin in 2011. Monitoring for restoration work completed in 2011 shall begin in 2012. Monitoring reports shall be submitted to EPA by December 1 each year through the end of the required monitoring period. Such reports shall be consistent, as appropriate and applicable, with the monitoring report requirements in Attachment 1.

4. For Tract 9970, the Defendants shall photograph the restoration areas subsequent to the restoration activities and submit the photos to EPA by October 15 of the year during which restoration takes place.

5. EPA shall have sixty (60) calendar days from the date of receipt of the original draft Restoration Work Plan, and thirty (30) days from the date of receipt of any revised draft Restoration Work Plan, to approve or reject it. If EPA comments on the original or any revised draft Restoration Work Plan, the Defendants shall incorporate EPA's comments and submit a

revised draft Restoration Work Plan to EPA within thirty (30) calendar days after receiving EPA's comments, unless that time period is extended by EPA. The resubmitted, revised draft Restoration Work Plan will then be approved or further revised if EPA has additional comments.

C. COMPENSATORY MITIGATION WORK PLAN

1. On Tract 9424, approximately 12.88 acres are allowed to remain in hay production pursuant to Paragraph 20A of the Consent Decree. In order to compensate for lost wetland functions and values, the Defendants shall develop and submit a compensatory mitigation work plan ("Mitigation Work Plan") within sixty (60) calendar days of the lodging of the Consent Decree. All provisions and specifications in the Mitigation Work Plan shall conform, to the extent appropriate and applicable, to the U.S. Army Corps of Engineers - New England District Mitigation Plan Checklist and Guidance (Attachment 1).

2. Compensatory mitigation shall take place on Tract 9970 on the 11.1 acres within Field UN-12 and on 1.7 acres within Field 7 located immediately to the east of Field UN-12 (refer to Attachment 10). Mitigation shall consist of the following:

a. Filling in the existing ditch between Fields UN-12 and UN-4 and filling in the existing ditch along the northern boundary of Field UN-12 (in conjunction with filling the ditch along the northern boundary of Field UN-4, as required by Paragraph B.1.c. above). These ditches shall be filled in to reach the elevation of the adjacent fields.

b. Relocating the existing ditch along the eastern side of UN-12 further east, sufficient to obtain an additional 1.7 acres of restoration area in Field 7. Spoils from the ditch relocations shall not be placed in the mitigation area; and

c. Restoring the existing agricultural fields within UN-12 and the adjacent 1.7 acres in Field 7 to wetlands as specified in Paragraph C.3 below.

3. The work to be performed shall be designed to achieve the compensatory mitigation goals described in Section A and shall include but need not be limited to the following:

a. Cessation of all agricultural or any other activity (aside from passive recreation) within the mitigation area;

b. Any drainage structures within the restoration area shall be permanently disabled.

c. All areas of exposed soil within the mitigation areas shall be seeded with an herbaceous wetland seed mixture;

d. Coarse woody debris shall be spread over three to five percent of the compensatory mitigation area;

e. The perimeter of the mitigation area that borders active agricultural fields shall be marked with permanent visual demarcations to prevent encroachment upon the mitigation area.

4. All compensatory mitigation work shall be completed in accordance with a schedule to be set out in the approved Mitigation Work Plan and shall be completed by October 15, 2009.

5. The Defendants shall develop and undertake a five (5) year monitoring program consistent, as appropriate and applicable, with the monitoring provisions in Attachment 1, to assess the success of the compensatory mitigation area in relation to the mitigation goals outlined in Paragraph A.2 above. Monitoring shall begin in 2010. Monitoring reports shall be submitted to EPA by December 1 each year through the end of the required monitoring period. Such

reports shall be consistent, as appropriate and applicable, with the monitoring report requirements in Attachment 1.

6. EPA shall have sixty (60) calendar days from the date of receipt of the original draft Mitigation Work Plan, and thirty (30) days from the date of receipt of any revised draft Mitigation Work Plan, to approve or reject it. If EPA comments on the original or any revised draft Mitigation Work Plan, the Defendants shall incorporate EPA's comments and submit a revised draft Mitigation Work Plan to EPA within thirty (30) calendar days after receiving EPA's comments, unless that time period is extended by EPA. The resubmitted, revised draft Mitigation Work Plan will then be approved or further revised if EPA has additional comments.

D. WORK PLAN DISPUTE RESOLUTION

1. If the Defendants object to any of EPA's comments regarding the original or any revised draft Restoration Work Plan or Mitigation Work Plan, or if the Defendants or EPA object to any subsequent proposed modification of the approved Restoration Work Plan or Mitigation Work Plan, the Defendants and EPA shall employ the dispute resolution provisions set forth in the remainder of this Section. The procedures outlined in this Section shall constitute the Defendants' sole means of objecting to, or disputing, any comments provided by EPA regarding the draft or any revised draft Restoration Work Plan or Mitigation Work Plan, and shall constitute the Defendants' and EPA's sole means of objecting to or disputing any subsequent proposed modification of the approved Restoration Work Plan or Mitigation Work Plan. Accordingly, the Dispute Resolution provisions contained in Section VIII of the Consent Decree do not apply to any objections or disputes described in this Section. Except as noted in

Paragraph E.3 below, all other disputes between the parties concerning Defendants' performance of wetland restoration and compensatory mitigation under the original or any modified Restoration Work Plan or Mitigation Work Plan shall be governed by the Dispute Resolution provisions of Section VIII of the Consent Decree.

2. If the Defendants object to any EPA comment regarding the original or any revised draft Restoration Work Plan or Mitigation Work Plan, or any subsequent modification of the approved Restoration Work Plan or Mitigation Work Plan proposed by EPA, the Defendants shall notify EPA in writing, at the addresses specified in Section VIII of the Consent Decree, of their objection(s) within ten (10) business days of receipt of the disputed EPA comment or modification. The Defendants' written notice ("Defendants' Objection Letter") shall describe the substance of the objection(s) and shall invoke this Section of Appendix I to the Consent Decree.

3. Upon EPA's receipt of the Defendants' Objection Letter, the parties shall conduct negotiations for up to ten (10) business days, during which time the Defendants have the right to meet with the appropriate Enforcement Office chief, or his or her designee, within EPA New England's Office of Environmental Stewardship. By agreement of the parties, a neutral facilitator or mediator may assist in the conduct of this meeting. If there is no agreement at the conclusion of the ten day period, but both parties agree that further negotiation would be beneficial, the parties may agree to continue dispute resolution (which can include more informal negotiations, mediation, or any other appropriate dispute resolution technique) for a period of time specifically agreed to in writing by EPA and the Defendants.

4. Any mutual resolution reached by the parties pursuant to Paragraph D.3. above shall be incorporated in writing into the Restoration Work Plan or Mitigation Work Plan and shall become effective without further action by the parties or the Court.

5. If the parties have not resolved the dispute by the conclusion of the dispute resolution period specified in Paragraph D.3. above (including any agreed-upon extensions), then the Defendants shall abide by the decision of the Enforcement Office Chief, and such decision shall be incorporated in writing into the Restoration Work Plan or Mitigation Work Plan, and shall become effective without further action by the parties or the Court, unless the Defendants, within five (5) business days after the end of the dispute resolution period, notify EPA in writing that they seek further dispute resolution of the matter.

6. In this written notice, the Defendants shall request a meeting with the Director of EPA New England's Office of Environmental Stewardship in order for the Defendants to make an oral presentation of their position. The Defendants may at their discretion provide further details regarding the substance of the dispute in this notice. Within ten (10) business days of (a) receiving the Defendants' written notice, or (b) after any requested meeting with the Defendants, whichever is later, the Office Director or his or her designee shall issue a written decision to the Defendants regarding the disputed issue. Such decision shall be incorporated into the Restoration Work Plan or Mitigation Work Plan, and shall become effective without further action by the parties or the Court.

7. If EPA objects to any proposed modification to the approved Restoration Work Plan or Mitigation Work Plan made by the Defendants, EPA staff shall notify the Defendants in writing of the objection(s) within ten (10) business days of receipt of the proposed modification.

The notice ("EPA's Objection Letter") shall describe the substance of the objections and shall invoke this Section of Appendix I to the Consent Decree. Upon the Defendants' receipt of EPA's objection letter, EPA and the Defendants shall follow the procedures and requirements set forth in Paragraphs D.3. through D.6.

E. PERFORMANCE OF WORK AND VERIFICATION OF COMPLIANCE

1. The Defendants shall carry out the wetland restoration and compensatory mitigation described in this Appendix in accordance with the approved Restoration Work Plan and Mitigation Work Plan and any subsequently incorporated modifications to them.

2. If at any time during the monitoring period EPA determines that any measures of success are not being attained and/or maintained, EPA or the Defendants may propose modifications to the approved Restoration Work Plan or Mitigation Work Plan to correct the problem. The parties shall adopt and incorporate into the approved Restoration Work Plan or Mitigation Work Plan the measure(s) that EPA deems necessary in order to attain and/or maintain the measures of success. Any such modification(s) to the approved Restoration Work Plan or Mitigation Work Plan shall be incorporated and become effective in accordance with the provisions of Paragraph E.5. below.

3. At any time after EPA approves the Restoration Work Plan or Mitigation Work Plan, EPA or the Defendants may propose modifications to the approved Restoration Work Plan or Mitigation Work Plan. Any proposed modifications shall be limited to those necessary to achieve the restoration goals for each individual area and to the maximum extent practicable shall not significantly increase the costs associated with restoration activities. Minor modifications shall be incorporated into the Restoration Work Plan or Mitigation Work Plan

upon agreement of the parties and shall become effective without further action by the parties or the Court. The parties shall resolve all disputes regarding proposed modifications to the approved Restoration Work Plan or Mitigation Work Plan, including but not limited to any disputes regarding any proposed modifications designed to attain and/or maintain any of the approved measures of success, in accordance with the dispute resolution procedures set out in Section D. above. Accordingly, the Dispute Resolution provisions in Section VIII of the Consent Decree do not apply to any disputes described in this Paragraph.

**APPENDIX II
GENERAL SCOPE OF WORK FOR RESTORATION
ACTIVITIES ON SEP AREAS**

A. GENERAL PROVISIONS

1. This Appendix generally describes the activities comprising restoration activities to be taken on Supplemental Environmental Project (SEP) areas referred to in Section V of the Consent Decree in the matter of United States v. Mark and Amanda St. Pierre (D. Vt) ("Consent Decree"). It provides an outline for restoration and monitoring work to be performed on Tract 1043, Field Nos. 5 and 14.

2. The goal of the restoration work described in this Appendix is to return identified areas to wetland so that within each restoration area the following conditions are met:

- a. A predominance (greater than 50%) of plant species with a wetland indicator status of facultative, facultative-plus, facultative-wet, or obligate;
- b. Hydric soils; and
- c. Soil saturation at or near the soil surface for 5% of the growing season.

3. All notices, reports, and other documents required herein, except for notices under Section C below, shall be submitted to the following address:

Dan Arsenaault
United States Environmental Protection Agency
Region I, Mail Code CMP
One Congress Street, Suite 1100
Boston, MA 02114
(617) 918-1562
Arsenaault.Dan@epamail.epa.gov

B. SEP WORK PLAN

1. Within sixty (60) calendar days of the lodging of the Consent Decree, the Defendants shall provide to EPA a draft detailed work plan ("SEP Work Plan") for performing restoration work and the monitoring activities specified below. All provisions and specifications in the SEP Work Plan shall conform, to the extent appropriate and applicable, to the U.S. Army Corps of Engineers - New England District Mitigation Plan Checklist and Guidance (Attachment 1).

a. The SEP areas are located on Tract 1043, Field Nos. 5 and 14 which are approximately 6.0 and 3.4 acres, respectively. These areas shall be restored to their natural condition. Refer to Attachments 3 and 4 for wetland restoration locations.

b. The work to be performed shall be designed to achieve the restoration goals described in Section A and shall include but need not be limited to the following:

(1) All areas of erosion above the SEP areas shall be stabilized and repaired to prevent further migration of sediment to the SEP areas and the Missisquoi River;

(2) Areas of eroded sediment deposit within the SEP areas shall be removed down to the original soil surface;

(3) Any drainage structures within the SEP areas shall be permanently disabled.

(4) All areas of exposed soil within the SEP areas shall be seeded with an herbaceous wetland seed mixture;

(5) Coarse woody debris shall be spread over three to five percent of the SEP areas;

(6) The SEP areas in their entirety shall have at least a 6 inch layer of loamy top soil prior to seeding and the spreading of coarse woody debris;

(7) All appropriate erosion and sedimentation controls shall be implemented and maintained to prevent the deposit of sediments into wetlands and all other surface waters.

(8) All restoration work on the SEP areas shall be completed by October 15 of the year during which restoration is being performed.

2. Wetland restoration on the SEP areas shall be completed in accordance with a schedule to be set out in the approved SEP Work Plan. The erosion problems in the SEP areas shall be repaired, as specified in Paragraph B.1.(b)(1) above, and in conjunction with the repair of the erosion problems in Fields UN-3 and UN-4 in Tract 1043 (see Appendix I, Paragraph B.1.b.(1)), no later than October 15, 2008. All remaining restoration work on the SEP areas shall be completed no later than October 15, 2009.

3. The defendants shall develop and undertake a five (5) year monitoring program consistent, as appropriate and applicable, with the monitoring provisions in Attachment 1, to assess the success of the compensatory mitigation area in relation to the mitigation goals outlined in Paragraph A.2 above. Monitoring shall begin in 2010. Monitoring reports shall be submitted to EPA by December 1 each year through the end of the required monitoring period. Such reports shall be consistent, as appropriate and applicable, with the monitoring report requirements in Attachment 1.

4. EPA shall have sixty (60) calendar days from the date of receipt of the original draft SEP Work Plan, and thirty (30) days from the date of receipt of any revised draft SEP Work Plan,

to approve or reject it. If EPA comments on the original or any revised draft SEP Work Plan, the Defendants shall incorporate EPA's comments and submit a revised draft SEP Work Plan to EPA within thirty (30) calendar days after receiving EPA's comments, unless that time period is extended by EPA. The resubmitted, revised draft SEP Work Plan will then be approved or further revised if EPA has additional comments.

C. WORK PLAN DISPUTE RESOLUTION

1. If the Defendants object to any of EPA's comments regarding the original or any revised draft SEP Work Plan, or if the Defendants or EPA object to any subsequent proposed modification of the approved SEP Work Plan, the Defendants and EPA shall employ the dispute resolution provisions set forth in the remainder of this Section. The procedures outlined in this Section shall constitute the Defendants' sole means of objecting to, or disputing, any comments provided by EPA regarding the draft or any revised draft SEP Work Plan, and shall constitute the Defendants' and EPA's sole means of objecting to, or disputing, any subsequent proposed modification of the approved SEP Work Plan. Accordingly, the Dispute Resolution provisions contained in Section VIII of the Consent Decree do not apply to any objections or disputes described in this Section. Except as noted in Paragraph D.3 below, all other disputes between the parties concerning Defendants' performance of restoration under the original or any modified SEP Work Plan shall be governed by the Dispute Resolution provisions of Section VIII of the Consent Decree.

2. If the Defendants object to any EPA comment regarding the original or any revised draft SEP Work Plan, or any subsequent modification of the approved SEP Work Plan, the Defendants shall notify EPA in writing, at the addresses specified in Section XI of the Consent

Decree, of their objection(s) within ten (10) business days of receipt of the disputed EPA comment or modification. The Defendants' written notice ("Defendants' Objection Letter") shall describe the substance of the objection(s) and shall invoke this Section of Appendix II of the Consent Decree.

3. Upon EPA's receipt of the Defendants' Objection Letter, the parties shall conduct negotiations for up to ten (10) business days, during which time the Defendants have the right to meet with the appropriate Enforcement Office chief, or his or her designee, within EPA New England's Office of Environmental Stewardship. By agreement of the parties, a neutral facilitator or mediator may assist in the conduct of this meeting. If there is no agreement at the conclusion of the ten day period, but both parties agree that further negotiation would be beneficial, the parties may agree to continue dispute resolution (which can include more informal negotiations, mediation, or any other appropriate dispute resolution technique) for a period of time specifically agreed to in writing by EPA and the Defendants.

4. Any mutual resolution reached by the parties pursuant to Paragraph C.3. above shall be incorporated in writing into the SEP Work Plan and shall become effective without further action by the parties or the Court.

5. If the parties have not resolved the dispute by the conclusion of the dispute resolution period specified in Paragraph C.3. above (including any agreed-upon extensions), then the Defendants shall abide by the decision of the Enforcement Office Chief, and such decision shall be incorporated in writing into the SEP Work Plan and shall become effective without further action by the parties or the Court, unless the Defendants, within five (5) business days after the

end of the dispute resolution period, notify EPA in writing that they seek further dispute resolution of the matter.

6. In this written notice, the Defendants shall request a meeting with the Director of EPA New England's Office of Environmental Stewardship in order for the Defendants to make an oral presentation of their position. The Defendants may at their discretion provide further details regarding the substance of the dispute in this notice. Within ten (10) business days of (a) receiving the Defendants' written notice, or (b) after any requested meeting with the Defendants, whichever is later, the Office Director or his or her designee shall issue a written decision to the Defendants regarding the disputed issue. Such decision shall be incorporated into the SEP Work Plan, and shall become effective without further action by the parties or the Court.

7. If EPA objects to any proposed modification to the approved SEP Work Plan made by the Defendants, EPA staff shall notify the Defendants in writing of the objection(s) within ten (10) business days of receipt of the proposed modification. The notice ("EPA's Objection Letter") shall describe the substance of the objections and shall invoke this Section of Appendix II of the Consent Decree. Upon the Defendants' receipt of EPA's objection letter, EPA and the Defendants shall follow the procedures and requirements set forth in Paragraphs C.3. through C.6.

D. PERFORMANCE OF WORK AND VERIFICATION OF COMPLIANCE

1. The Defendants shall carry out the wetland restoration described in this Appendix in accordance with the approved SEP Work Plan and any subsequently incorporated modifications to it.

2. If at any time during the monitoring period EPA determines that any measures of success are not being attained or maintained, EPA or the Defendants may propose modifications to the approved SEP Work Plan to correct the problem. The parties shall adopt and incorporate into the approved SEP Work Plan the measure(s) that EPA deems necessary in order to attain or maintain the measures of success. Any such modification(s) to the approved SEP Work Plan shall be incorporated and become effective in accordance with the provisions of Paragraph D.3 below.

3. At any time after EPA approves the SEP Work Plan, EPA or the Defendants may propose modifications to the approved SEP Work Plan. Any proposed modifications shall be limited to those necessary to achieve the restoration goals for the property restored under the SEP and to the maximum extent practicable shall not significantly increase the costs associated with restoration activities. Minor modifications shall be incorporated into the approved SEP Work Plan upon agreement of the parties and shall become effective without further action by the parties or the Court. The parties shall resolve all disputes regarding proposed modifications to the approved SEP Work Plan, including but not limited to any disputes regarding any proposed modifications designed to attain and/or maintain any of the approved measures of success, in accordance with the dispute resolution procedures set out in Section C. above. Accordingly, the Dispute Resolution provisions in Section VIII of the Consent Decree do not apply to any disputes described in this Paragraph.



US Army Corps
of Engineers®
New England District

NEW ENGLAND DISTRICT MITIGATION GUIDANCE for NEW ENGLAND DISTRICT MITIGATION PLAN CHECKLIST

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INTRODUCTION

Applicants should contact the Corps prior to initiation of site selection and mitigation plan development because mitigation requirements are project-specific. This New England District document and the associated New England District Mitigation Plan Checklist ("Checklist") are for use when the Corps determines mitigation is appropriate for a particular project. They represent New England District policy and have already incorporated the requirements of the following documents:

1. Model Compensatory Mitigation Plan Checklist and supporting supplement (<http://www.mitigationactionplan.gov/checklist.pdf>) and
2. Incorporating the National Research Council's Mitigation Guidelines into the Clean Water Act Section 404 Program. (<http://www.mitigationactionplan.gov/nas404program.pdf>)
3. Regulatory Guidance Letter 06-03: Minimum Monitoring Requirements for Compensatory Mitigation Projects Involving the Creation, Restoration, and/or

Enhancement of Aquatic Resources

(http://www.usace.army.mil/cw/cecwo/reg/rgls/rgl06_03.pdf)

In addition, federal agencies involved with mitigation are developing guidance on many aspects of mitigation. The status of the Mitigation Action Plan components, and the guidance documents themselves as they are completed, is available at <http://www.mitigationactionplan.gov/>.

The purpose of this document is twofold:


1. To provide guidance to the regulated community on the requirements for mitigation required by the Corps of Engineers, New England District, and
2. To provide a standardized format for the Corps to use in reviewing mitigation plans for their technical merit.

It is important to note that there is some flexibility in the document. For example, it is not designed to be specific to tidal wetland creations and would therefore need to be modified for such situations. When variances are necessary, the proposed mitigation plan should provide a simple explanation of the rationale. However, some items are required by law or policy and are indicated by use of the term "must." We acknowledge that absolutes are rare in mitigation design and that a successful site requires careful design, detailed review, and common sense oversight during construction by a person well versed in wetland science.

All checklist items should be included in the mitigation plan or there should be an explanation as to why they are not appropriate.

After Corps review, items not marked with OK, N/A (Not Applicable), or NONE should be addressed by the applicant. A sample table format to cross-reference the checklist and a mitigation plan is included as Table 1.

Occasionally there are conflicts between requirements of the Corps and those of state and/or local agencies. Notify the Corps when this situation arises and the Corps will work with the applicant and state or local agencies to avoid duplication of effort and meet agency requirements. Normally, use of the most rigorous standard will be acceptable to all agencies. Note that the Corps prefers to receive only one monitoring report per project per year.

The  used throughout this document indicates text which should typically be included in the mitigation plan.

Definitions

These definitions are for use with this document. Somewhat different definitions may exist in other documents.

Mitigation in relation to S.404: While mitigation includes sequencing from avoidance to minimization to, finally, compensation, it is frequently used instead of "compensation," including in this document.

Compensatory mitigation: Action taken which provides some form of substitute aquatic resource for the impacted aquatic resource. It may include created, restored, enhanced wetlands, streams, mudflats, etc. and preserved wetlands, streams, and/or uplands.

Wetlands creation: The transformation of upland or deepwater habitat to wetland at a site where the upland or deepwater habitat was not created by human activity. It is sometimes referred to as "establishment." Wetlands creation results in a gain in wetland acreage.

Wetlands restoration: Returning a former wetland area, which had been filled, drained, or excavated so that it no longer qualifies as a wetland, to wetland conditions. It is sometimes referred to as "re-establishment." Wetlands restoration results in a gain in wetland acreage.

Wetlands enhancement: Restoring degraded FUNCTIONS of an existing wetland. Degradation may result from infestation by invasive species, partial filling that does not create upland, deliberate removal of woody species (natural changes such as flooding and subsequent demise of trees as a result of beaver activity is not degradation), partial draining, etc. Restoration of an existing wetland's natural functions is sometimes called "rehabilitation." Wetlands enhancement does not result in a gain in wetland acreage.

Invasive species: Native and non-native species which aggressively move into areas, especially those that are disturbed, and crowd out less aggressive native species.

Noxious weed: Any living stage, such as seeds and reproductive parts, of any parasitic or other plant of a kind, which is of foreign origin, is new to or not widely prevalent in the United States, and can directly or indirectly injure crops, other useful plants, livestock, or poultry or other interests of agriculture, including irrigation, or navigation, or the fish or wildlife resources of the United States or the public health.¹

Exotic species: Species not native to New England, and usually not native to North America.

Cultivars: Non-native species or varieties which are developed for cultivation (e.g., agriculture, landscaping).

¹ From the 1974 Federal Noxious Weed Act.

Wetland scientist: The applicant should work with the Corps Project Manager to determine the appropriate expertise for the "wetland scientist" needed to oversee a particular project.

Data Presentation

The use of charts, tables, and plan overlays to present data for impact and mitigation areas is encouraged. They are often the most concise method of conveying information and make comparison easier. Tables 2 and 3 at the end of this Introduction are examples of useful presentations of data.

Temporal Losses

All projects which do not have advance mitigation will result in temporal losses which occur as a result of the passage of time between the time when wetland functions are lost to the project impact and when they exist to a similar degree in a compensatory wetland. For example, the wildlife and ecosystem support functions of forested wetlands may take 30-50 years or more to develop. Applicants should be aware that additional compensation is likely to be required to offset temporal losses. Functions which *may* not lag behind mitigation construction are flood storage and groundwater discharge and/or recharge. While sediment trapping may develop relatively quickly, water quality functions can take many years to develop as they depend upon the chemical and biological characteristics of the wetland soils. The amount of additional compensation will depend upon the nature of the wetland proposed and the functions intended. Such compensation may include increased area for wetland creation, restoration, or enhancement or it may be solely additional preservation.

Effective Replacement of Functions

In addition, applicants should expect that more than 1:1 acreage replacement will usually be deemed appropriate BASED ON WETLAND FUNCTIONS impacted and likely to be established, temporal loss of functions, and a "safety factor". The baseline addresses the expected reduction in function (wildlife habitat, water quality functions performed by soils, etc.) of created or restored wetlands in comparison with wetlands formed in place. It also includes a safety factor to allow for some degree of failure. It has been our experience that some portion of most mitigation sites fail to establish wetland conditions or fail to develop the appropriate hydrology which affects resulting wetland functions.

Wetland mitigation is not an exact science; an adaptive management attitude is a necessity. Consider incorporating experimentation such as including experimental plots with different controls and treatments. This approach requires detailed planning, effective implementation of the plan, close monitoring, adjusting to intermediate results, and making additional modifications when needed to reach the long-term goals.

Checklist

Many items on the checklist are self-explanatory. Those which require specific guidance or clarification are noted below.

A. GENERAL INFORMATION

1. To avoid confusion, all mitigation proposal materials should be submitted as a single package without extraneous information that is needed for the permit evaluation but is not pertinent to the mitigation itself.

2. a. Locus maps that show the location of the impact area and the location of mitigation sites – including preservation areas – are critical components of the plan. They should depict the geographic relationship between the impacted site(s) and the proposed mitigation site(s) and include a vicinity map of approximately 1 inch equals 2,000 feet. For sites where the relationship between the impacted site(s) and proposed mitigation site(s) is not clear at USGS quadrangle scale, an additional plan should be provided at an appropriate scale.

b. Aerial photographs, if available, should be included. There are several on-line sources available. Recent photographs are preferred.

c. Longitude and latitude of the mitigation site(s), including preservation areas, should be given in decimal format, rather than degrees and minutes or UTM's.

d. Watershed(s) must be identified using the USGS 8-digit Hydrologic Unit Code(s) for each mitigation site (See Item A.2 on the Checklist), including preservation sites. One source of these codes is an EPA website at:
<http://cfpub.epa.gov/surf/locate/index.cfm>.

B. IMPACT AREA(S)

Impact areas include both wetlands and waters. Most of the checklist items are self-explanatory but clarification is provided for stream information, functions and values assessment, and watershed plans.

2. Wetlands at each impact site should be described using Cowardin, et. al.² and hydrogeomorphic³ classification systems.

² Cowardin, et. al. (1979) "Classification of wetlands and deepwater habitats of the United States," Office of Biological Services, FWS/OBS-79/31, December 1979.

³ Brinson, M. M. (1993). "A hydrogeomorphic classification for wetlands," Technical Report WRP-DE-4 <<http://www.wes.army.mil/el/wetlands/pdfs/wrpde4.pdf>>, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS. NTIS No. AD A270 053.

3. If any streams will be impacted, information needed includes length of banks to be impacted, nature of banks, normal seasonal flows, gradient, sinuosity, bed load, lengths of riffles and pools, and adjacent landscape. Note that Regulatory Guidance Letter 02-2 states that stream functions lost must also be mitigated.

4. When performing functions and values assessments, simply stating "wildlife habitat" or "fishery habitat" is inadequate. Additional information needs to be provided. Provide indicator species for the habitat type such as forest-dwelling migratory birds or mole salamanders and/or woodfrogs for a vernal pool. The more specific the information, the more confidence the Corps will have in the evaluation.

6. Watershed and/or regional plans that describe aquatic resource objectives should be discussed if such plans are available for the impact area(s). If no such plans exist, this should be stated.

C. MITIGATION AREA(S)

1. Background Information

a. Provide an explanation of sites and methodologies considered for mitigation activities and the rationale for selection or rejection. Attachments 1 and 2 discuss when use of a potential mitigation site is practicable, whether on-site or off-site mitigation is appropriate, and whether out-of-kind mitigation is appropriate instead of in-kind. In order to replace the impacted functions, in-kind mitigation is strongly preferred unless the impacted site is heavily degraded.

Long-term sustainability is a key feature of successful wetland mitigation. Wherever possible, select sites where wetlands previously existed and/or where nearby wetlands currently exist. Restoration is frequently more feasible and sustainable than creation of wetlands.

Also, whenever possible, locate the mitigation site in a setting of comparable landscape position and hydrogeomorphic class as the impact wetland.

b. – e. Information on the selected site(s)'s existing wildlife usage, soils, vegetation, and surrounding land use are required. **Wildlife usage** must include information on any probable state and federal threatened and endangered species habitat. Subsurface **soil conditions** have a critical role in mitigation design, whether the substrate is sand, loam, silt, clay, and/or bedrock. Therefore, soil profiles should be provided that extend down to at least two feet below the proposed new soil surface. Since much of New England has been and continues to be heavily developed, there is a potential for industrial and agricultural contaminants in the soil. Although contamination does not necessarily preclude the use of a site, testing that is commensurate with the risk may be needed. Describe the existing **vegetation** on the site including a list of species, dominant species, density, community types,

and community structure. **Surrounding land use** should be described within at least 500 feet of the site(s) and include a discussion of likely future land uses. Include a discussion of how the site(s) plans fit into the watershed context and the proximity of the site to public and private protected lands.

f. USFWS and/or NOAA Clearance Letter or Biological Opinion is to ensure that threatened or endangered species will not be impacted by the mitigation. This is not necessarily addressed in those agencies' comments on the proposed project requiring mitigation.

g. SHPO/THPO letters on the proposed project also may not address potential concerns at the mitigation site.

2. Mitigation Proposed

a. – c. Similar information is required for the mitigation area(s) as for the impacted area(s). Along with mitigation acreage at each site, the type of mitigation (i.e., creation, restoration, enhancement, preservation) should be identified. A single mitigation site may not be able to provide the full range of functions desired because some functions are incompatible. For example, some wildlife habitat may not be compatible with flood storage.

Typically, detention/retention basins are not acceptable for use as compensatory mitigation. Their construction results from requirements of the constructed project to mitigate stormwater concerns for the project itself, not address the lost functions of the impacted wetlands. In addition, they often require frequent maintenance to retain functionality, decreasing their ability to develop a full suite of wetland functions. However, detention/retention basins can serve to minimize the adverse effects of a project on nearby wetlands and waters, provided that the stormwater management system will be maintained for the life of the project.

d. In general this should be on a 1:1 linear foot of bank basis unless a functional assessment methodology indicates that another basis for mitigation is appropriate. Again, Regulatory Guidance Letter 02-2 states that stream functions lost must also be mitigated.

f. Frequently mitigation designs are constrained by the project itself, landscape features, or public issues that control or otherwise influence the design and/or monitoring and remediation of the mitigation area. Such constraints need to be explained in detail. If there are no constraints (rare), that should be stated in the plan.

g. To ensure that someone with expertise in wetland science provides construction oversight for the mitigation project, the following language should be included in the narrative portion of the mitigation plan:

➔ A wetland scientist shall be on-site to monitor construction of the wetland mitigation area(s) to ensure compliance with the mitigation plan and to make adjustments when appropriate to meet mitigation goals.

h. Construction timing of the mitigation and the proposed wetland impacts affects temporal impacts. Therefore, the following language should be included in the narrative portion of the mitigation plan:

➔ Compensatory mitigation shall be initiated not later than 90 days after project initiation and completed not later than one year after the permitted wetland impacts occur unless the Corps-approved mitigation plan specifically states otherwise and compensation for the temporal impacts are appropriate.

If the impact will occur before the mitigation is constructed, the mitigation plan will address temporal losses.

In either of the above situations, the permittee will work with the Corps to develop financial assurances for the mitigation construction and monitoring, including remedial actions.

i. All parties legally responsible for planning, accomplishing, and maintaining the mitigation project are identified.

j. In accordance with national guidance, financial assurances will be required when the Corps determines it is appropriate to ensure successful implementation of the mitigation⁴. This will include most projects where the mitigation work is not accomplished in its entirety prior to the permitted impacts to aquatic resources. The text to use when such assurances are required is:

➔ The permittee will post a performance bond for \$_____ for construction of the wetland mitigation, monitoring, and potential remedial action as determined by the Corps of Engineers. This figure was based on the attached worksheet of construction and monitoring costs, plus a specified inflation factor, plus a 10% contingency. The bond shall be in the form of a firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570. The bond must be in place at all times the construction is underway and during the entire monitoring period, including any extensions required by the Corps of Engineers to ensure permit compliance. Permitted impacts to aquatic resources will not occur until the Corps has approved the bond format, the bond has been executed, and a copy has been provided to the Corps.

⁴ State Departments of Transportation are excluded from this type of financial assurance requirement.

Upon completion of construction and written concurrence from the Corps, the bond may be reduced to an amount that will cover the costs of monitoring and possible remedial actions.

Note that other forms of acceptable security may be possible such as postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States. However, please discuss alternatives to performance bonds with the Corps prior to their use.

Treasury Department Circular 570 is published in the Federal Register, and may be obtained from the U.S. Department of Treasury, Financial Management Service, Surety Bond Branch, 401 14th Street, NW, 2nd Floor, West Wing, Washington, DC 20227, or found at <http://www.fms.treas.gov/c570/index.html>.

k. Wildlife can pose serious threats to aircraft and therefore mitigation sites near airports are of concern to the Federal Aviation Administration. See Federal Aviation Administration Advisory Circular AC No: 150/5200-33, 5/1/97, <http://www1.faa.gov/arp/pdf/5200-33.pdf>.

D. HYDROLOGY

Avoid use of water-control structures which must be maintained in perpetuity.

1. The expected seasonal depth, duration, and timing of both inundation and saturation should be described for each of the proposed habitat zones in the mitigation area (particularly related to root zone of the proposed plantings). If shallow monitoring wells are used to develop this rationale, the observations should be correlated to local soil morphologies, rooting depths, water marks or other local evidence of flooding, ponding, or saturation, and reflect rainfall conditions during monitoring.

Monitoring Wells

Note that monitoring wells may not be necessary if other data are adequate. Please discuss this issue with Corps staff prior to installation.

Many mitigation plans include monitoring well data. Note that there is an important difference between monitoring wells and piezometers, both of which provide useful information. Since accurate placement and installation of monitoring wells and/or piezometers affects the accuracy and usefulness of the data, details on the uses for and installation of both of these types of wells are available in two documents prepared by the Engineers Research and Development Center's Environmental Lab, previously known as the Waterways Experiment Station:

- "Installing Monitoring Wells/Piezometers in Wetlands", ERDC TN-WRAP-00-02, can be found at: <http://el.erdc.usace.army.mil/wrap/pdf/tnwrap00-2.pdf>,
- "Technical Standard for Water-Table Monitoring of Potential Wetland Sites", ERDC TN-WRAP-05-02, can be found at: <http://el.erdc.usace.army.mil/wrap/pdf/tnwrap05-2.pdf>.

If monitoring wells are used and the site is adjacent to a wetland system, installation of at least one well in the adjacent system may provide useful information on the relationship of the water table in the wetland to the one in the proposed mitigation site.

2. Plan indicates if the water source is groundwater, surface runoff, precipitation, lake and/or stream overflow, tidal, and/or springs and seeps. Provide substantiation (e.g., well data, adjacent wetland conditions, stream gauge data, precipitation data). Precipitation data is available on the Internet. Sites include <http://www.erh.noaa.gov> under the appropriate Eastern Region Weather Forecast Office and the Northeast Regional Climate Center (<http://www.nrcc.cornell.edu>).

If stormwater from the project is part of the water budget, information should be provided if that water contribution will not be immediately available. For example, in a highway project, if the mitigation grading will be completed before the highway but the portion of the runoff intended to flow to the mitigation will not be directed to the site immediately, this should be explained. This does not imply that a detention basin will be considered compensatory mitigation nor does it imply that mitigation close to an impact area will be appropriate to compensate for all the impacted functions.

3. If vernal pool creation is included as part of the mitigation plan, provide evidence that adequate hydrology will be provided to support the target obligate vernal pool species (mole salamanders, woodfrogs, and/or fairy shrimp).

E. GRADING PLANS

1. a. Plan provides existing and proposed grading plans for mitigation area. Existing contours should be to at least 2' intervals. Proposed contours should be to 1' intervals in the wetlands portion of the mitigation with spot elevations for intermediate elevations. All other areas should be shown at 2' contour intervals.

b. Where microtopographic variation is planned, the proposed maximum differences in elevation should be specified. The plan does not need to show the locations of each pit and mound as long as a typical cross-section and approximate number of pits and mounds is given for each zone. Note that natural wetland systems with trees and/or shrubs typically have microrelief so created or restored areas of those types should typically have similar variability.

d. Plans should be on 8 ½ x 11" sheets. Large size sheets are encouraged for clarity, but only as a supplement to the letter-sized sheets.

Soil compaction by heavy machinery may adversely affect plantings and/or may result in perching of water. Therefore, efforts should be made to minimize soil compaction area during grading of the mitigation site. If use of heavy machinery cannot be avoided, compaction must be addressed by disking or some other treatment to loosen the soil surface. Similar consideration should be given while spreading the topsoil.

f. The drawings should show the access for maintenance and monitoring.

2. Plan provides representative cross sections showing the existing and proposed grading plan, expected range of shallow groundwater table elevations or surface water level consistently expected. Cross-sections should include key features such as upland islands and pools. They should extend beyond the mitigation site into adjacent wetlands and uplands.

F. TOPSOIL

Manmade topsoil shall consist of a mixture of equal volumes of organic and mineral materials. Well-decomposed clean leaf compost is the preferred soil amendment to achieve these standards. Note that "clean" refers both to the lack of physical contaminants such as plastic and to the lack of chemical contaminants. If other soil amendments are more readily available than clean leaf compost they can be used to meet the requirement for the appropriate percent organic carbon content (see Item F.3). Note, however, that compost or other organic matter should be clean and free of weed seeds, specifically the seeds of the species listed in Table 4. Peat is not recommended for soil amendments as its harvesting methods are generally destructive to wetlands.

It is important to keep in mind the difference between organic *matter* and organic *carbon* both for meeting regulatory guidelines and when classifying the surface horizons in soils as histic (organic soils), mucky modified or mineral. The organic *carbon* content of most upland topsoil is between 1 and 6 percent of dry weight. Soils with more than 20 to 30 percent organic *matter* (12 to 17 percent organic *carbon* content) are known as organic soils or Histosols. The Field Indicators for Identifying Hydric Soils in New England (New England Hydric Soils Technical Committee, 2004, 3rd ed.) glossary defines the criteria for these classifications based on their organic *carbon* contents. 4-12% minimum organic *carbon* content (9 to 21 percent organic *matter*) on a dry weight basis for soils should be used in wetland replication areas. The rule of thumb for conversion is to divide organic *matter* by

1.72 to get organic *carbon* content and multiply organic *carbon* by 1.72 to get organic *matter* content⁵:

$$O_m / 1.72 = O_c \quad \text{and} \quad O_c \times 1.72 = O_m$$

Scrub-shrub and forested wetlands should have about 12% organic carbon; emergent wetlands in permanently or semi-permanently inundated areas may only need 4-6%.

Note that the term "loam" that is frequently used for the material spread on a mitigation site after subsoil grading is a landscaping term. In soil science, the term refers to a specific texture of soil comprised of specific amounts of sand, silt, and clay particles. The landscaping term is not a scientific term and should be avoided.

When topsoil must be stockpiled on site, the plan should include plans for maintaining moisture in the soil. The following measures are suggested for the contractor doing the work:

- Seek approval for location of stockpiled materials (from owner/engineer);
- Avoid stockpiling compost organics in piles over 4 feet in height;
- Protect stockpiles from surface water flow and contain them with haybales and/or siltfence;
- Cover stockpiles with a material that prevents erosion (tarps, erosion control mat, straw and temporary seed, depending on size and duration of storage)
- Inspect and repair protection measures listed above regularly (weekly), as well as prior to (to the extent possible) and after storm events.
- Maintain moisture in the soils during droughty periods.

1. Topsoil for mitigation sites can be a source of invasive species seeds. Provide information on the source and the likelihood that such seeds are in it.

2. Twelve or more inches of natural or manmade topsoil should be used in most wetland mitigation areas. Exceptions might be permanently or semi-permanently inundated or saturated areas and turtle nesting areas. Rationale for less than 12 inches should be provided.

3. Natural topsoil proposed to be used for the creation/restoration/ enhancement of wetlands consists of at least 4-12% organic carbon content (by weight) (or 9-21% organic matter content), **with the percentage specified**. Manmade topsoil used for the creation/restoration/enhancement of wetlands consists of a mixture of equal volumes of organic and mineral materials. This may be accomplished by adding a specific depth of organic material and disking it in to twice that depth. The actual

⁵ Excerpted from Allen, Art, "Organic Matters", *AMWS Newsletter*, December 2001.

measured organic content of the topsoil used should be provided in the as-built plan submitted with the first monitoring report.

G. PLANTING PLAN

Planting and/or seeding are generally appropriate for a mitigation site, as determined through consultation with the Corps. When planting is proposed as part of the plan, the guidelines noted below should be followed.

Irrigation

Note that irrigation is solely to enhance the success of vegetation establishment, not to provide hydrology. The use of irrigation for woody plantings should be considered for the first one to two growing seasons after planting due to the unpredictability of short-term local hydrologic conditions and the need for additional care to establish new plantings. Equipment (e.g., pipes, pumps, sprinklers) must be removed and irrigation discontinued no later than the end of the second growing season unless the Corps concurs with extended irrigation. In this situation, the monitoring period shall be extended an equivalent time period.

Two methods have been used successfully: water trucks and installation of irrigation systems. The former is limited by accessibility for the truck(s), a likely problem on large sites. The latter tends to be less expensive and may be more effective for large projects.

Use of Mulch

The use of mulch around woody plantings is strongly encouraged, and may be required, to reduce the need for irrigation and to keep down herbaceous vegetation in the immediate vicinity of each plant for a couple of years. There are at least two methods available: biodegradable plastic (which should be stapled to the ground) or organic mulch. Note that organic mulch should not be considered part of the organic content of the topsoil and it should not be used in locations that will be inundated as it may float away. Suggested specifications for organic mulching are as follows:

- Mulch balled and burlaped or container-grown trees and shrubs in a 3' diameter circle approximately 2" deep.
- Mulch bare-root woody planting in an 18" diameter circle approximately 2" deep.

1. The use of scientific names ensures that all involved have the correct understanding of the species of plants proposed to be planted or seeded.

2. Native planting stock from the immediate vicinity of the project is ideal. Whenever possible, plants should be salvaged from wetlands and uplands cleared by the project. Transplanting entire blocks of vegetation with several inches of the original wetland soil substrate from the impact areas has been found very effective in establishing mitigation wetlands. However, beware of the potential for transplanting invasive species.

No cultivars shall be used. Beware of stock identified as a native species which is actually a cultivar or non-native species (e.g., there have been several instances around New England of *Alnus incana* or *Alnus rugosa* labels on non-native *Alnus glutinosa*)

During the first few years while the designed wetland vegetative zones become established, they are susceptible to colonization and subsequent domination by invasive species. A number of plants are known to be especially troublesome in this regard. The following stipulation shall be included in the mitigation plan, either in the plan view or in the narrative portion of the plan:

→ To reduce the immediate threat and minimize the long-term potential of degradation, the species included on the "Invasive and Other Unacceptable Plant Species" list in Table 4 of the New England District Mitigation Plan Guidance shall not be included as planting stock in the overall project. Only plant materials native and indigenous to the region shall be used (with the exception of **[specify]**). Species not specified in the mitigation plan shall not be used without prior written approval from the Corps.

3. The Cowardin (1979) classification system is typically used to identify the plant communities proposed. If another system is used, an explanation of terms may be needed.

4. A plan view drawing should show where the various species are proposed to be planted. Since showing each individual plant is neither practical nor realistic, this may be illustrated with areas of uniform species composition and the number of plants or rate of seeding within the polygon. The scale should be in the range of 1"=20' to 1"=100', depending on the size of the site.

5. Although the prevailing hydrology will ultimately influence the type of wetland that will develop, plantings "jump start" the project. Some species tend to volunteer promptly whereas others may take years to move into a site; consideration should be given to emphasize planting species unlikely to "volunteer" during the monitoring period.

6. Woody stock should be proposed to be planted in densities not less than 600 trees and shrubs per acre, including at least 400 trees per acre in forested cover types.

Woody planting densities may require adjustment depending upon the goals of the mitigation plan and the 'reference wetland' used to develop the habitat goals. For example, if the primary goal for a particular creation site is flood storage and there is minimal need for wildlife habitat but there is interest in developing a woody component in the flood storage area, the density may be reduced. Also, if the wetland type desired is a dense thicket, the density may need to be increased.

7. Where uniform coverage is anticipated, herbaceous stock should be proposed to be planted in densities not less than the equivalent of 3 feet on center for species which spread with underground rhizomes; 2 feet on center for species which form clumps.

8. The list of species proposed in seed mixes should not include any species in the list of invasives in Table 4. Similarly, non-native genotypes and cultivars should not be used.

Although the use of non-native species is typically discouraged, there are situations where such use may be appropriate such as using *Secale cereale* (Annual Rye) to quickly stabilize a site. The species should be noted and the reason for their use explained.

Species listed in Table 4 are not to be included as seed or planting stock in the overall project.⁶ Most of these species do not need to be actively removed from the site. Exceptions are included in the Monitoring section (Section M). More may be added by the Corps on a case-by-case basis.

9. Cross-sectional drawings should include identification of vegetative community zones (e.g., forested, shrub swamp, etc.). This can be combined with the plans required for grading if they are not too complex.

10. The following stipulation shall be included in the mitigation plan, either in the drawings or in the narrative portion of the plan:

→ During planting, a qualified wetland professional may relocate up to 50 percent of the plants in each community type if as-built site conditions would pose an unreasonable threat to the survival of plantings installed according to the mitigation plan. The plantings shall be relocated to locations with suitable hydrology and soils and where appropriate structural context with other plantings can be maintained.

⁶ This list is a compilation of state lists from New England and additional species recommended by regional botanical experts.

H. COARSE WOODY DEBRIS AND OTHER FEATURES

Coarse woody debris includes such materials as logs, stumps, smaller branches, and standing snags. Placement of this material is generally inappropriate in tidal or frequently flooded environments, and may not be appropriate for herbaceous systems. As much as possible, these materials will be in various stages of decomposition and salvaged from natural areas cleared for the other elements of the project. The following language is included in the mitigation plan, either in the drawings or in the narrative portion of the plan:

➡ A supply of dead and dying woody debris shall cover at least 4% of the ground throughout the mitigation sites after the completion of construction of the mitigation sites. These materials should not include species shown on the list of invasive species (Table 4) in the New England District Mitigation Plan Guidance.

When mitigation requires a component of forest or scrub-shrub habitat, the design should include plans for a continuum of coarse woody debris, including snags (standing dead trees).

When a tree dies, it may continue to provide habitat for another century or longer. The speed of the recycling processes depends on many factors, but the main point is that coarse woody materials are relatively durable and remain as important ecological features both below- and above-ground for a long time. Long after the last needles or leaves fall to the forest floor, a tree persists, parceling itself out in bits and pieces.

In the first years, if a tree remains upright, the greatest volume of its litter may consist of bark, twigs, and small branches. Later, as insects and fungus weaken the aerial framework, larger limbs and sections of the trunk tumble to the ground where decay occurs under quite different conditions. On the forest floor, well-decomposed logs may sustain greater faunal richness. In an ideal situation, there is an uninterrupted supply of woody litter in various sizes and stages of decay providing a diverse range of habitats. Decomposition is one of the natural processes in a healthy forest. If one link of the chain is lacking, the process falters. Wetland builders should factor coarse woody debris into most habitat mitigation strategies.

Frequently the inclusion of scattered various sized boulders, as well as woody debris is an appropriate method of increasing structure and habitat in a site. Note of caution: if not properly screened by a wetland scientist, such debris can be a source of invasive species.

I. EROSION CONTROLS

The following language is included in the mitigation plan, either in the drawings or in the narrative portion of the plan:

→ Temporary devices and structures to control erosion and sedimentation in and around mitigation sites shall be properly maintained at all times. The devices and structures shall be disassembled and properly disposed of as soon as the site is stable but no later than November 1 three full growing seasons after planting. Sediment collected by these devices will be removed and placed upland in a manner that prevents its erosion and transport to a waterway or wetland.

Cordoning off of an entire site with erosion controls is discouraged as it impedes animal movement. If circling of an entire site is needed, either gaps or overlaps with intervening space should be provided.

J. INVASIVE AND NOXIOUS SPECIES

Projects should avoid introducing or increasing the risk of invasion by unwanted plants (such as those listed in J.3. below) or animals (such as zebra mussels). Soils disturbed by projects are very susceptible to invasion by undesirable species. Be particularly alert to the risk of invasion on exposed mineral soils. Exposed mineral soils may result from excavation or filling. Noxious species often get a foothold along project drainage features where the dynamics of erosion and accretion prevail. Along saltmarshes, be especially alert to the project's influence on freshwater runoff. Frequently, *Phragmites australis* invasion is an unanticipated consequence of freshwater intrusion into the saltmarsh. Information from the Invasive Plants Atlas of New England is available at: <http://nbii-nin.ciesin.columbia.edu/ipane/>.

1. The discussion of risk should include an assessment of the potential for invasion of the wetland by the species listed in J.3 or other identified problematic species specific to this project or site.
2. The plan should identify regulatory and ecological constraints that influence the design of any plan to control invasive plants and animals by biological, mechanical, or chemical measures. For example, if a state requires a permit for use of herbicide, this may constrain attempts to control an invasive plant species. If there are no constraints, this should be stated.
3. The plan should describe the strategy to control, or recognize and respond to, the degradation of the mitigation site by invasive or noxious plants. The plan should address a full range of practicable measures to minimize threats to wetlands as well as all associated buffers or other habitats that are factored in project impact mitigation by Common reed (*Phragmites australis*), Purple loosestrife (*Lythrum salicaria*), Buckthorns (*Rhamnus* spp.), Olives (*Elaeagnus* spp.), Multiflora rose (*Rosa multiflora*), Reed canary-grass (*Phalaris arundinacea*), Japanese knotweed (*Polygonum cuspidatum*), and any other species identified as a problem at the site. The plan should consider traditional control methods including: mechanical (pulling,

mowing, or excavating on-site), chemical (herbiciding), and biological (planting fast-growing trees and shrubs for shading or releasing herbivorous insects).

K. OFF-ROAD VEHICLE USE

If there is a potential for off-road vehicle access at the site, which may include snowmobile usage, the mitigation plan shall include a strategy to minimize impacts. Plans should illustrate locations of any necessary barriers placed at access points to the mitigation sites to prevent vehicles from damaging the sites.

L. PRESERVATION

1. Adequate buffers must be proposed to protect the ecological integrity of creation, restoration, and/or enhancement areas.

In most cases, a protected (preserved) buffer will be required around creation, restoration, and enhancement sites, including stream mitigation as this is of benefit on a local and watershed scale throughout New England. The extent of the buffer will depend upon the landscape position of the site(s) and current and potential surrounding land uses but it will be rare that a buffer less than 100 feet in width will be adequate. Usually buffers will consist of uplands but wetlands also may serve that function.

2. Wetlands within subdivisions, golf courses, etc. should generally be protected along with appropriate buffers. This is part of the avoidance and minimization steps of mitigation, not part of compensation.
3. Preservation should be part of every mitigation package as preservation of a creation, restoration, or enhancement area, and buffer; the remaining unimpacted wetlands on-site as part of avoidance and minimization; as a stand-alone form of mitigation; or as any combination of these. Ideally the preservation document will be prepared, reviewed, and approved by the Corps prior to submission of the final mitigation plan and permit issuance. If this is not possible, the following language should be included in the plan⁷:

→ Compensatory mitigation sites and on-site unimpacted wetlands (and buffers) to be set aside for conservation shall be protected in perpetuity from future development. Within 90 days of the date this permit is issued and prior to initiation of permitted work in aquatic resources, the permittee shall submit to the Corps of Engineers a draft of the conservation easement or deed restriction. Within 30 days of the date the Corps approves this draft document in writing, the permittee shall execute and record it with the Registry of Deeds for the Town of _____ and the State of _____. A copy of the executed

⁷ Departments of Transportation, in particular, may need to have the timing requirements modified. This will be addressed on a case-by-case basis.

and recorded document must then be sent to the Corps of Engineers within 90 days of the date it was recorded. The conservation easement or deed restriction shall enable the site or sites to be protected in perpetuity from any future development. For preservation as part of compensation, the conservation easement or deed restriction shall expressly allow for the creation, restoration, remediation and monitoring activities required by this permit on the site or sites. It shall prohibit all other filling, clearing and other disturbances (including vehicle access) on these sites except for activities explicitly authorized by the Corps of Engineers in these approved documents.

If it is possible to have the document prepared and approved prior to final mitigation plan submission and permit issuance, only the following needs to be included:

➔ Within 30 days of the date of permit issuance and prior to initiation of permitted work in aquatic resources, the permittee shall execute and record the preservation document with the Registry of Deeds for the Town of _____ and the State of _____. A copy of the executed and recorded document must then be sent to the Corps of Engineers within 90 days of the date it was recorded.

4. Plans showing the location of all sites to be preserved are required. In addition to a locus, they must be sufficiently detailed to determine relationships to adjacent development and/or properties as these adjacent areas affect the long term sustainability of the site. In some cases it may be appropriate to have signs at the boundaries of the preservation area(s). The sign design should be noted in the documentation.

5. There are numerous forms of preservation documents. They include fee transfer to another entity such as a non-profit organization or public agency, easement given to a non-profit organization or public agency, deed restriction, or restrictive covenant. The form should be specified or a copy of the document(s) included. Fee transfer and conservation easements are preferred. Deed restrictions are discouraged as they are difficult to enforce and are often easily changed.

M. MONITORING PLAN

Once the final mitigation plan is incorporated into the permit, the permit will require full implementation of the mitigation plan, including remedial measures during the first five or more growing seasons to ensure success. Typically, sites proposed to be emergent-only wetlands will be monitored for five years and sites proposed to be scrub-shrub and/or forested wetlands will be monitored for five to ten years (years 1, 2, 3, 5, 7, and 10 for the latter), as extended periods for monitoring will be appropriate in some cases. Failure to implement the plan and remedial measures constitutes permit non-compliance as do failure to submit copies of financial assurances and/or preservation documents and failure to submit required monitoring and assessment documents.

Electronic submission of monitoring reports is strongly encouraged. Portable Document Format is preferred (e.g., Adobe PDF). When submitted in electronic format, there is no restriction for using standard paper sizes. These monitoring reports should be concise and effectively provide the information necessary to assess the status of the compensatory mitigation project. Large, bulky reports containing general information are discouraged. The reports should follow a 10-page maximum report format per site, with a self-certification form transmittal. The information required below should be framed within this format.

1) Project Overview⁸ (1 page)

2) Requirements (1 page)

List the monitoring requirements and performance and/or success standards, as specified in the approved mitigation plan and special conditions of the permit, and evaluate whether the compensatory mitigation project site is successfully achieving the approved performance and/or success standards or trending toward success.

3) Summary Data (maximum of 4 pages)

Summary data must be provided to substantiate the success and/or potential challenges associated with the compensatory mitigation project. Photo documentation should be provided to support the findings and recommendations, and placed in the Appendix.

4) Maps (maximum of 3 pages)

Maps must be provided to show the location of the compensatory mitigation site relative to other landscape features, habitat types, locations of photographic reference points, transects, sampling data points, and/or other features pertinent to the mitigation plan. In addition, the submitted maps must clearly delineate the mitigation site boundaries to assist in proper locations for subsequent site visits. Each map or diagram must fit on a standard 8 ½ x 11" piece of paper and include a legend and the location of any photos submitted for review.

5) Conclusions (1 page)

A general statement must be included describing the conditions of the compensatory mitigation project. If performance or success standards are not being met, a brief discussion of the difficulties and potential remedial actions proposed by the permittee, including a timetable, must be provided.

⁸ See Attachment 1

The following language should be included in the narrative portion of the mitigation plan:



MONITORING

Notification of Construction Completion

Within 60 days of completing a mitigation project that includes restoration, creation, and/or enhancement, the applicant will submit a signed letter to the Corps, Policy Analysis and Technical Support Branch, specifying the date of completion of the mitigation work.

If mitigation construction is initiated in, or continues throughout the year, but is not completed by December 31 of any given year, the permittee will provide the Corps, Policy Analysis and Technical Support Branch, a letter providing the date mitigation work began and the work completed as of December 31. The letter will be sent no later than January 31 of the next year. The letter will include the Corps permit number.

Monitoring Report Guidance

For each of the first [specify] full growing seasons following construction of the mitigation site(s), the site(s) will be monitored and annual monitoring reports submitted. Observations will occur at least two times during the growing season – in late spring/early summer and again in late summer/early fall. Each annual monitoring report will be submitted to the Corps, Regulatory Division, Policy Analysis and Technical Support Branch, no later than December 15 of the year being monitored. Failure to perform the monitoring and submit monitoring reports constitutes permit non-compliance. A self-certification form⁹ will be completed, and signed as the transmittal coversheet for each annual monitoring report and will indicate the permit number and the report number (Monitoring Report 1 of 5, for example). The reports will address the following success-standards in the summary data section and will address the additional items noted in the monitoring report requirements, in the appropriate section. The reports will also include the monitoring-report appendices listed below. The first year of monitoring will be the first year that the site has been through a full growing season after completion of construction and planting. For these special conditions, a growing season starts no later than May 31. However, if there are problems that need to be addressed and if the measures to correct them require prior approval from the Corps, the permittee will contact the Corps by phone (1-800-362-4367 in MA or 1-800-343-4789 in ME, VT, NH, CT, RI) or letter as soon as the need for corrective action is discovered.

⁹ See Attachment 2

Remedial measures will be implemented - at least two years prior to the completion of the monitoring period - to attain the success standards described below within **[specify]** growing seasons after completion of construction of the mitigation site(s). Should measures be required within two years of the end of the monitoring period, the monitoring period will be extended to ensure two years of monitoring after the remedial work is completed. Measures requiring earth movement or changes in hydrology will not be implemented without written approval from the Corps.

At least one reference site adjacent to or near each mitigation site will be described and shown on a locus map.

Success Standards

1) The site has the hydrology, as demonstrated with well data collected at least weekly from March through June or other substantial evidence, to support the designed wetland type.

Is the proposed hydrology met at the site?

What percentage of the site is meeting projected hydrology levels?

Areas that are too wet or too dry should be identified along with suggested corrective measures.

2) The proposed vegetation diversity and/or density goals for woody plants from the plan are met.

Unless otherwise specified in the mitigation plans, this should be at least 500 trees and shrubs per acre, of which at least 350 per acre are trees for proposed forested cover types, that are healthy and vigorous and are at least 18" tall in 75% of each planned woody zone AND at least the following number of non-exotic species including planted and volunteer species. Volunteer species should support functions consistent with the design goals. To count a species, it should be well represented on the site (e.g., at least 50 individuals of that species per acre).

# species planted	minimum # species required (volunteer and planted)
2	2
3	3
4	3
5	4
6	4
7	5
8	5
9 or more	6

Vegetative zones consist of areas proposed for various types of wetlands (shrub swamp, forested swamp, etc.). The performance standards for density can be assessed using either total inventory or quadrat sampling methods, depending upon the size and complexity of the site.

- 3) a. Each mitigation site has at least 80% areal cover, excluding planned open water areas or planned bare soil areas (such as for turtle nesting), by noninvasive species (See Table 4).
- b. Planned emergent areas on each mitigation site have at least 80% cover by noninvasive hydrophytes.
- c. Planned scrub-shrub and forested cover types have at least 60% cover by noninvasive hydrophytes, of which at least 15% are woody species.

For the purpose of this success standard, invasive species of hydrophytes are:

Cattails -- *Typha latifolia*, *Typha angustifolia*, *Typha glauca*;
Common Reed -- *Phragmites australis*;
Purple Loosestrife -- *Lythrum salicaria*;
Reed Canary Grass -- *Phalaris arundinacea*; and
Buckthorn -- *Rhamnus frangula*.

- 4) Common reed (*Phragmites australis*), Purple loosestrife (*Lythrum salicaria*), Russian and Autumn olive (*Elaeagnus* spp.), Buckthorn (*Rhamnus* spp.), Japanese knotweed (*Polygonum cuspidatum*), and/or Multiflora rose (*Rosa multiflora*) plants at the mitigation site(s) are being controlled.

For this standard, small patches must be eliminated during the entire monitoring period. Large patches must be aggressively treated and the treatment documented.

- 5) All slopes, soils, substrates, and constructed features within and adjacent to the mitigation site(s) are stable.

Monitoring Report Requirements

Additional items for inclusion:

Project Overview

- Highlighted summary of problems which need immediate attention (e.g., problem with hydrology, severe invasives problem, serious erosion, major losses from herbivory, etc.). This should be at the beginning of the report and highlighted in the project overview and in the self-certification form.

Requirements

- A copy of this permit's mitigation special conditions and summary of the mitigation goals.

Summary Data

- Address success standards achievement and/or measures to attain the standards.
- Describe the monitoring inspections, and provide their dates, that occurred since the last report.
- Soils data, commensurate with the requirements of the soils portion of the 1987 Corps Wetlands Delineation Manual (Technical Report Y-87-1 and approved regional supplements) New England District data form, should be collected after construction and every alternate year throughout the monitoring period. If monitoring wells or gauges were installed as part of the project, this hydrology data should be submitted annually.
- Concisely describe remedial actions done during the monitoring year to meet the five success standards – actions such as removing debris, replanting, controlling invasive plant species (with biological, herbicidal, or mechanical methods), regrading the site, applying additional topsoil or soil amendments, adjusting site hydrology, etc. Also describe any other remedial actions done at each site.
- Report the status of all erosion control measures on the compensation site(s). Are they in place and functioning? If temporary measures are no longer needed, have they been removed?
- Give visual estimates of (1) percent vegetative cover for each mitigation site and (2) percent cover of the invasive species listed under Success Standard No. 3, above, in each mitigation site.
- What fish and wildlife use the site(s) and what do they use it for (nesting, feeding, shelter, etc.)?
- By species planted, describe the general health and vigor of the surviving plants, the prognosis for their future survival, and a diagnosis of the cause(s) of morbidity or mortality.

IF MITIGATION INCLUDES VERNAL POOL CREATION:

Does the vernal pool creation take into account the critical need for unobstructed access to and from the pool, as well as an adequate extent of upland habitat to ensure success?

Pool(s) are monitored for obligate and facultative vernal pool species weekly for four weeks from the beginning of the vernal pool activity in the spring (will vary throughout New England) and then biweekly until the end of July for the entire monitoring period. The period of monitoring is specified. Data identify frog species, salamander genera, and the presence/absence of fairy shrimp. Macroinvertebrates can be identified to the order.

In addition, photographs of the pool(s) taken monthly during the pool monitoring period (March/April-July) from a set location(s) will be included. Photographs will include panoramas of surrounding habitat.

Other data required: pH and temperature of water at beginning and end of each monitoring cycle; pool depth at deepest point(s) (or state if >3') to nearest inch or centimeter; substrate of pool(s) (dead leaves, herbaceous vegetation, bare soil—organic or mineral, etc.); plant species noted in and around the perimeter of the pool(s).

If the state has a vernal pool register or certification program, the pool(s) is registered and/or certified prior to the final monitoring report submission.

Conclusions

- What remedial measures are recommended to achieve or maintain achievement of the five success standards and otherwise improve the extent to which the mitigation site(s) replace the functions and values lost because of project impacts?

Monitoring Report Appendices

Appendix A -- An as-built plan showing topography to 1-foot contours, any inlet/outlet structures and the location and extent of the designed plant community types (e.g., shrub swamp). Within each community type the plan shall show the species planted—but it is not necessary to illustrate the precise location of each individual plant. There should also be a soil profile description and the actual measured organic content of the topsoil. This should be included in the first monitoring report unless there are grading or soil modifications or additional plantings of different species in subsequent years.

Appendix B – A vegetative species list of volunteers in each plant community type. The volunteer species list should, at a minimum, include those that cover at least 5% of their vegetative layer.

Appendix C -- Representative photos of each mitigation site taken from the same locations for each monitoring event. Photos should be dated and clearly labelled with the direction from which the photo was taken. The photo sites must also be identified on the appropriate maps.

N. ASSESSMENT PLAN

The following language should be included in the narrative portion of the mitigation plan:



ASSESSMENT

A post-construction assessment of the condition of the mitigation site(s) shall be performed following the fifth growing season after completion of the mitigation site(s) construction, or by the end of the monitoring period, whichever is later. "Growing season" in this context begins no later than May 31st. To ensure objectivity, the person(s) who prepared the annual monitoring reports shall not perform this assessment without written approval from the Corps. The assessment report shall be submitted to the Corps by December 15 of the year the assessment is conducted; this will coincide with the year of the final monitoring report, so it is acceptable to include both the final monitoring report and assessment in the same document.

The post-construction assessment shall include the four assessment appendices listed below and shall:

- Summarize the original or modified mitigation goals and discuss the level of attainment of these goals at each mitigation site (include vernal pool creation if that is a component of the mitigation).
- Describe significant problems and solutions during construction and maintenance (monitoring) of the mitigation site(s).
- Identify agency procedures or policies that encumbered implementation of the mitigation plan. Specifically note procedures or policies that contributed to less success or less effectiveness than anticipated in the mitigation plan.
- Recommend measures to improve the efficiency, reduce the cost, or improve the effectiveness of similar projects in the future.

ASSESSMENT APPENDICES:

Appendix A -- Summary of the results of a functions and values assessment of the mitigation site(s), using the same methodology used to determine the functions and values of the impacted wetlands.

Appendix B -- Calculation of the area of wetlands in each mitigation site using the 1987 Corps Wetlands Delineation Manual and approved regional supplements. Supporting documents shall include (1) a scaled drawing showing the wetland boundaries and representative transects and (2) datasheets for corresponding data points along each transect.

Appendix C -- Comparison of the area and extent of delineated constructed wetlands (from Appendix B) with the area and extent of created wetlands proposed in the mitigation plan. This comparison shall be made on a scaled drawing or as an overlay on the as-built plan. This plan shall also show the major vegetation community types.

Appendix D -- Photos of each mitigation site taken from the same locations as the monitoring photos, including photos of vernal pools, if applicable.

O. CONTINGENCY

Describe the procedures to be followed should unforeseen site conditions or circumstances prevent the site from developing as intended. Examples of such situations include unanticipated beaver activity, disruption of the groundwater by blasting or other construction in the vicinity, unexpected subgrade texture, unearthing an unexpected archaeological site, and encountering hazardous waste.

P. LONG TERM STEWARDSHIP

It is important that sites have long term sustainability and, as such, are protected from degradation. Applicants should consider both current and expected future hydrology (including effects of any proposed manipulations), sediment transport, locations of water resources, and overall watershed functional goals before choosing a mitigation site. This is extremely critical in watersheds that are rapidly urbanizing; changing infiltration rates can modify runoff profiles substantially, with associated changes in sediment transport, flooding frequency, and water quality. More importantly, applicants must plan for long-term survival by placing mitigation in areas that will remain as open space and not be severely impacted by clearly predictable development. Consideration of the landscape perspective requires evaluation of buffers and connectivity (both hydrologic- and habitat-related). Buffers are particularly important to insure that changing conditions are ameliorated, especially in watersheds that have been, or are in the process of being, heavily developed. In addition, because wetlands are so dynamic, adequate buffers and open space upland areas are vital to allowing for wetlands to "breathe" (expand and/or

decrease in size and function) and migrate within the landscape, particularly in watersheds under natural and/or man-made pressures.

Appropriate provisions must be made to support the mitigation site in perpetuity. The owner of the site or the holder of a conservation easement will be responsible for ensuring the site is in compliance with the permit, including mitigation requirements, in perpetuity.

Q. OTHER COMMENTS

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Treasury Department Circular 570.

U.S. Army Corps of Engineers. 2002. Guidance on compensatory mitigation projects for aquatic resource impacts under the Corps Regulatory Program pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. Regulatory Guidance Letter No. 02-2.

U.S. Army Corps of Engineers. 2005. "Technical Standard for Water-Table Monitoring of Potential Wetland Sites," *WRAP Technical Notes Collection* (ERDC TN-WRAP-05-2), <http://el.erdc.usace.army.mil/wrap/pdf/tnwrap05-2.pdf> U.S. Army Engineer Research and Development Center, Vicksburg, MS.

U.S. Army Corps of Engineers. 2006. Minimum monitoring requirements for compensatory mitigation projects involving the creation, restoration, and/or enhancement of aquatic resources. Regulatory Guidance Letter No. 06-03.

Table 1
Example Cross-reference between Mitigation Plan and
New England District, U. S. Army Corps of Engineers
Mitigation Plan Checklist (2004).

Check-list Item	Description	Relevant Section	Page Number
A. General Information			
1.	One complete package		
2.a	Locus map	Figure 1	
2.b	Aerial photo	Figure 2	
2.c	Lat/Long	Figure 1	
2.d	HUC	Section A	p.1
B. Impact Area(s)			
1.	Wetland acreage	Section A	p.2, Table 1
2.	Wetland classes	Section A	p.3, Table 1
3.	Streams	Section A	p. 3, Table 1
4.	Wetland and stream functions and values	Section A	p.3, Table 1
5.	Type and purpose of work	Section A	p. 3
6.	Watershed plans	Section A	p. 4
C. Mitigation Area(s)			
1.a	Mitigation alternatives	Section B	
1.b	Existing wildlife use	Section C	p.2
1.c	Existing soil	Section C	p.3
1.d	Existing vegetation	Section C	p. 7
1.e	Surrounding land use	Section C	p.9
1.f	USFWS Clearance Letter	Section C	p.12
1.g	SHPO Clearance Letter	Section C	p. 13
2.a	Wetland acreages and mitigation types at each site	Section D	p. 1, Table 2
2.b	Wetland classes at each site	Section D	p. 2, Table 2
2.c	Functions and values proposed at each site	Section D	p. 2, Table 2
2.d	Stream mitigation	Section D	p.3
2.e	Reference site(s)	Section D	p. 4
2.f	Design Constraints	Section E	p.1
2.g	Construction oversight	Section E	p. 2
2.h	Project construction timing	Section E	p. 3
2.i	Responsible parties	Section E	p. 5
2.j	Financial assurances	Section F	
2.k	FAA Issues	Section E	p.6
D. Hydrology			
1.	Adequate hydrology	Section G	p. 8, Tables 3, 4

1.a	Typical year water budget	Section G	Figure 1
1.b	Wet year water budget	Section G	Figure 2
1.c	Dry year water budget	Section G	Figure 3
2.	Water source(s)	Section G	p. 8
3.	If vernal pool, adequate hydrology	Section G	p. 9, 23
E. Grading Plan			
1.a	Plan View – existing and proposed contours	Appendix A	Figures 2-5
1.b	Plan View – microtopography	Appendix A	Figures 2-5
1.c	Plan View – scale	Appendix A	
1.d	Plan View – legible	Appendix A	
1.e	Plan View – bar scale	Appendix A	
2.	Representative cross-sections	Appendix A	Figures 7-9
3.	Other grading comments (if any)	N/A	
F. Topsoil			
1.	Proposed source	Section H	p. 1
2.	Depth	Section H	p. 5, Figures 7-9
3.	Organic content	Section H	p. 6
G. Planting Plan			
1.	Scientific names	Appendix A	Figures 2-5
2.	Native materials, no invasive species plantings	Section H	pp. 8, 11
3.	Community types	Section H	p. 8
4.	Location on plans	Appendix A	Figures 2-5
5.	Plantings for community type	Section H	p. 8
6.	Woody stock density	Appendix A	Figures 2-5
7.	Herbaceous stock density	N/A	
8.	Seed mix composition	Section H	p. 10
9.	Cross-sections	Appendix A	Figures 7-9
10.	Relocation text	Section H	p. 12
11.	Other	N/A	
H. Coarse Woody Debris and Other Features			
	Is proposed	Appendix A	Figure 2-5
I. Erosion Controls			
	Deadline for removal	Section H	p. 7
J. Invasive and Noxious Species			
1.	Risk	Section I	p. 1
2.	Constraints	Section I	p. 1
3.	Control plan	Section I	p. 2
K. Off-Road Vehicle Use			
1.	Usage in vicinity	Section I	p. 4
2.	Control plan	N/A	
L. Preservation			

1.	Adequate buffers	Section J	p. 1
2.	Internal wetlands protected	Section J	Figure 10
3.	Preservation language	Section J	p. 2
4.	Preservation site plans	Section J	Figure 11
5.	Legal instrument(s)	Section J	p. 5
6.	Acceptance by receiving agency	Section J	p. 5
M. Monitoring Plan			
	Appropriate language	Section K	
N. Assessment Plan			
	Appropriate language	Section L	
O. Contingency			
	Plan in place	Section M	
P. Long-term Stewardship			
Q. Other			

Table 2
Sample Summary of Proposed Wetland Mitigation

MITIGATION SITE	TYPE OF MITIGATION	SIZE
1	Wetland Enhancement (E), Restoration (R), and Creation (C)	E = 15,600 s.f. R = 49,560 s.f. C = 15,900 s.f.
2	Wetland Creation	42,100 s.f.
3	Wetland Preservation (note: sites 1 and 2 to be preserved as well)	13.5 acres
3	Upland Preservation	6.3 acres

Table 3
Sample Wetland Impact Area Function-Value Summary

Wetland Impact Area #	Area (s.f.)	Wetland Type (Cowardin)	WETLAND FUNCTIONS AND VALUES												
			G W R / D	F F A	S & T R	N R & T	P E	S & S	F & S H	W L H	T & E	R E C	E D / S	U / H	V Q / A
1	31,350	PFO1/ PSS1B	X	X						P					X
2	14,190	PEM1/ PSS1B	X	P		X			X	X					
3	23,600	PFO1	X							P		X			
4	49,010	PSS1B	X	X		X				P					X
5	2,350	PEM1		X	X	X		P		X					

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Table 4
Invasive and other Unacceptable Plant Species¹⁰

a. Herbs:

<i>Aegopodium podagraria</i>	Goutweed or Bishop's weed
<i>Aira caryophyllea</i>	Silver hairgrass
<i>Alliaria petiolata</i>	Garlic mustard
<i>Allium vineale</i>	Field garlic
<i>Ampelopsis brevipedunculata</i>	Porcelain berry
<i>Anthoxanthum odoratum</i>	Sweet vernal grass
<i>Anthriscus sylvestris</i>	Chervil
<i>Arctium minus</i>	Common burdock
<i>Asparagus officinalis</i>	Asparagus
<i>Barbarea vulgaris</i>	Yellow rocket
<i>Bromus tectorum</i>	Drooping brome-grass
<i>Butomus umbellatus</i>	Flowering rush
<i>Cabomba caroliniana</i>	Fanwort
<i>Callitriche stagnalis</i>	Water-starwort
<i>Calystegia sepium</i>	Japanese bindweed
<i>Cardamine impatiens</i>	Bushy rock-cress
<i>Cardamine pratensis</i>	Cuckoo-flower
<i>Carex kobomugi</i>	Japanese sedge
<i>Centaurea biebersteinii</i>	Spotted knapweed
<i>Chelidonium majus</i>	Celandine
<i>Cirsium arvense</i>	Canada-thistle
<i>Cirsium palustre</i>	Marsh thistle
<i>Commelina communis</i>	Asiatic day-flower
<i>Coronilla varia</i>	Crown vetch
<i>Cyperus esculentus</i>	Yellow nutsedge
<i>Dactylis glomerata</i>	Orchard-grass
<i>Datura stramonium</i>	Jimsonweed
<i>Echinochloa crusgalli</i>	Barnyard grass
<i>Egeria densa</i>	Giant waterweed
<i>Eichhornia crassipes</i>	Water hyacinth
<i>Eleusine indica</i>	Goosegrass
<i>Elsholtzia ciliata</i>	Elsholtzia
<i>Elytrigia repens</i>	Quack-grass
<i>Epilobium hirsutum</i>	Hairy willow-herb
<i>Euphorbia cyparissias</i>	Cypress spurge
<i>Euphorbia esula</i>	Leafy spurge
<i>Festuca filiformia</i>	Hair fescue
<i>Festuca ovina</i>	Sheep fescue

¹⁰ Scientific names are those used in Gleason, Henry and A. Cronquist, 1991, *Manual of Vascular Plants of Northeastern United States and Adjacent Canada*: Second Edition, The New York Botanical Garden: New York.
5/25/2004 DRAFT
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NEW ENGLAND DISTRICT
REGULATORY DIVISION

<i>Froelichia gracilis</i>	Slender snake cotton
<i>Geranium nepalense</i> (<i>G. sibericum</i>)	Nepalese crane's-bill
<i>Geranium thunbergii</i>	Thunberg's geranium
<i>Glaucium flavum</i>	Sea- or horned poppy
<i>Glechoma hederacea</i>	Gill-over-the-ground
<i>Glyceria maxima</i>	Sweet reedgrass
<i>Hemerocallis fulva</i>	Tiger-lily
<i>Heracleum mantegazzianum</i>	Giant hogweed
<i>Hesperis matronalis</i>	Dame's rocket
<i>Hydrilla verticillata</i>	Hydrilla
<i>Hydrocharis morsus-ranae</i>	European frog-bit
<i>Hylotelephium telephium</i> (<i>Sedum telephium</i>)	Live-forever or Orpine
<i>Hypericum perforatum</i>	St. John's wort
<i>Impatiens glandulifera</i>	Ornamental jewelweed
<i>Iris pseudacorus</i>	Yellow iris
<i>Kochia scoparia</i>	Summer cypress
<i>Lamium</i> spp. (all)	Dead nettle
<i>Lepidium latifolium</i>	Tall pepperwort
<i>Lotus corniculatus</i>	Birdsfoot trefoil
<i>Lysimachia nummularia</i>	Moneywort
<i>Lysimachia vulgaris</i>	Garden loosestrife
<i>Lythrum salicaria</i>	Purple loosestrife
<i>Malva neglecta</i>	Cheeses or common malva
<i>Marsilea quadrifolia</i>	Water shamrock or Eu. water clover
<i>Mentha arvensis</i>	Field-mint
<i>Microstegium vimineum</i>	Japanese stilt-grass
<i>Miscanthus sinensis</i>	Eulalia
<i>Myosotis scorpioides</i>	True forget-me-not
<i>Myosoton aquaticum</i>	Giant chickweed
<i>Myriophyllum aquaticum</i>	Parrot feather
<i>Myriophyllum heterophyllum</i>	Variable water-milfoil
<i>Myriophyllum spicatum</i>	Eurasian water-milfoil
<i>Najas minor</i>	Lesser naiad
<i>Nymphoides peltata</i>	Yellow floating heart
<i>Ornithogalum umbellatum</i>	Star of Bethlehem
<i>Pastinaca sativa</i>	Wild parsnip
<i>Phalaris arundinacea</i>	Reed canary-grass
<i>Phragmites australis</i>	Reed grass, Phragmites
<i>Poa compressa</i>	Canada bluegrass
<i>Poa pratensis</i>	Kentucky bluegrass
<i>Poa trivialis</i>	Rough bluegrass
<i>Polygonum aubertii</i>	Silver lace-vine
<i>Polygonum cespitosum</i>	Cespitose knotweed
<i>Polygonum cuspidatum</i>	Japanese knotweed
<i>Polygonum perfoliatum</i>	Mile-a-minute vine

<i>Polygonum persicaria</i>	Lady's thumb
<i>Polygonum sachalinense</i>	Giant knotweed
<i>Potamogeton crispus</i>	Curly pondweed
<i>Puccinellia maritima</i>	Seaside alkali-grass
<i>Pueraria montana</i>	Kudzu
<i>Ranunculus ficaria</i>	Lesser celandine
<i>Ranunculus repens</i>	Creeping buttercup
<i>Rorippa microphylla</i>	One-row yellow cress
<i>Rorippa nasturtium-aquaticum</i>	Watercress
<i>Rorippa sylvestris</i>	Creeping yellow cress
<i>Rumex acetosella</i>	Sheep-sorrel
<i>Rumex obtusifolius</i>	Bitter dock
<i>Salvinia molesta</i>	Salvinia
<i>Senecio jacobaea</i>	Tansy ragwort
<i>Setaria pumila</i> (<i>S. lutescens</i> , <i>S. glauca</i>)	Yellow foxtail or y. bristlegrass
<i>Silphium perfoliatum</i>	Cup plant
<i>Solanum dulcamara</i>	Bittersweet nightshade
<i>Stellaria graminea</i>	Common stitchwort
<i>Tanacetum vulgare</i>	Tansy
<i>Thymus pulegioides</i>	Wild thyme
<i>Trapa natans</i>	Water-chestnut
<i>Tussilago farfara</i>	Coltsfoot
<i>Typha latifolia</i> ¹¹	Common or Broad-leaved cattail
<i>Typha angustifolia</i> ⁴	Narrow-leaved cattail
<i>Valeriana officinalis</i>	Garden heliotrope
<i>Verbascum thapsus</i>	Common mullein
<i>Veronica beccabunga</i>	European speedwell
<i>Vincetoxicum rossicum</i> (<i>V. nigrum</i>)	Black swallow-wort
<i>Xanthium strumarium</i>	Common cocklebur

b. Woody Plants:

<i>Acer ginnala</i>	Amur maple
<i>Acer platanoides</i>	Norway maple
<i>Acer pseudoplatanus</i>	Sycamore maple
<i>Actinidia arguta</i>	Kiwi vine
<i>Ailanthus altissima</i>	Tree-of-heaven
<i>Alnus glutinosa</i>	European alder
<i>Berberis thunbergii</i>	Japanese barberry
<i>Berberis vulgaris</i>	Common barberry
<i>Catalpa speciosa</i>	Western catalpa

¹¹ *Typha* spp. are native species which provide good water quality renovation and other functions/values. However, they are aggressive colonizers which, given the opportunity, will preclude establishment of other native species. They are included in this list as species not to be planted, not because they are undesirable in an established wetland, but to provide opportunities for other species to become established. It is likely they will eventually move in without human assistance.

<i>Celastrus orbiculatus</i>	Oriental bittersweet
<i>Cynanchum louiseae</i>	Black swallow-wort
<i>Cytisus scoparius</i>	Scotch broom
<i>Elaeagnus angustifolia</i>	Russian olive
<i>Elaeagnus umbellata</i>	Autumn olive
<i>Euonymus alata</i>	Winged euonymus
<i>Euonymus fortunei</i>	Climbing euonymus
<i>Humulus japonicus</i>	Japanese hops
<i>Hypericum prolificum</i>	Shrubby St. John's wort
<i>Ligustrum obtusifolium</i>	Japanese privet
<i>Ligustrum vulgare</i>	Common/hedge privet
<i>Lonicera japonica</i>	Japanese honeysuckle
<i>Lonicera maackii</i>	Amur honeysuckle
<i>Lonicera morrowii</i>	Morrow's honeysuckle
<i>Lonicera tartarica</i>	Tatarian honeysuckle
<i>Lonicera x bella</i>	Morrow's X Tatarian honeysuckle
<i>Lonicera xylosteum</i>	European fly-honeysuckle
<i>Morus alba</i>	White mulberry
<i>Paulownia tomentosa</i>	Princess tree or empress tree
<i>Phellodendron japonicum</i>	Corktree
<i>Populus alba</i>	Silver poplar
<i>Rhamnus cathartica</i>	Common buckthorn
<i>Rhamnus frangula</i>	European buckthorn
<i>Ribes sativum</i>	Garden red currant
<i>Robinia pseudoacacia</i>	Black locust
<i>Rosa multiflora</i>	Multiflora rose
<i>Rosa rugosa</i>	Rugosa rose
<i>Rubus phoenicolasius</i>	Wineberry
<i>Salix purpurea</i> ¹²	Basket or purple-osier willow
<i>Sorbus aucuparia</i>	European mountain-ash
<i>Taxus cuspidata</i>	Japanese yew
<i>Ulmus pumila</i>	Siberian elm
<i>Wisteria floribunda</i>	Wisteria

¹² This is not appropriate for use in wetland mitigation. In some circumstances it may be appropriate in stream bank stabilization.

ATTACHMENT 1

Project Overview Form

Corps Permit No.:

Mitigation Site Name(s):

Monitoring Report: _____ of _____

Name and Contact Information for Permittee and Agent:

Name of Party Responsible for Conducting the Monitoring:

Date(s) of Inspection(s):

Project Summary:

[include purpose of approved project, acreage and type of aquatic resources impacted, and mitigation acreage and type of aquatic resources authorized to compensate for the aquatic impacts]

Location of and Directions to Mitigation Site:

Start and Completion Dates for Mitigation:

Performance Standards **are/are not** being met:

[describe how]

Dates of Corrective or Maintenance Activities Conducted Since Last Report:

Recommendations for Additional Remedial Actions:

ATTACHMENT 2

MITIGATION REPORT
TRANSMITTAL AND SELF-CERTIFICATION

DEPARTMENT OF THE ARMY PERMIT NUMBER:
PROJECT TITLE:

PERMITTEE:
MAILING ADDRESS:

TELEPHONE:

AUTHORIZED AGENT:
MAILING ADDRESS:

TELEPHONE:

ATTACHED MITIGATION REPORT
TITLE:

PREPARERS:

DATE:

CERTIFICATION OF COMPLIANCE: I certify that the attached report is accurate and discloses that the mitigation required by the Department of the Army Permit [is] [is not] in full compliance with the terms and conditions of that permit.

CORRECTIVE ACTION: A need for corrective action [is] [is not] identified in the attached report.

CONSULTATION: I [do] [do not] request consultation with the Corps of Engineers to discuss a corrective strategy or permit modification.

CERTIFIED: _____
(Signature of permittee) Date



**US Army Corps
of Engineers®**
New England District

**NEW ENGLAND DISTRICT
MITIGATION PLAN CHECKLIST**

(see New England District Mitigation Guidance document for clarifying information)

Project: ____
File No: ____
Corps Project Manager: ____
City: ____
State: ____
Plan Title: ____
Plan Preparer: ____
Plan Date: ____

TABLE OF CONTENTS

A. General Information	J. Invasive and Noxious Species
B. Impact Area(s)	K. Off-Road Vehicle Use
C. Mitigation Area(s)	L. Preservation
D. Hydrology	M. Monitoring Plan
E. Grading Plan	N. Assessment Plan
F. Topsoil	O. Contingency
G. Planting Plan	P. Long-term Stewardship
H. Coarse Woody Debris & Other Features	Q. Other Comments
I. Erosion Controls	

A. General Information

1. ☐ Mitigation plan and documentation submitted as one complete package.
2. Site location:
 - a. ☐ Locus map(s)
 - b. ☐ Aerial photo(s)
 - c. ☐ Latitude/Longitude of mitigation site(s) in decimal format.
 - d. ☐ 8-digit Hydrologic Unit Code(s) for impact area(s) and mitigation area(s).

B. Impact area(s)

1. ☐ Wetland acreage at each impact site.
2. ☐ Wetland classes at each impact site.
3. ☐ Stream(s) at each impact site.
4. ☐ Describe both site specific and landscape level wetland and stream functions and values at each impact site.
5. ☐ Describe type and purpose of work at each impact site.
6. ☐ Relationship to watershed or regional plans for the area discussed.

C. Mitigation area(s)

1. Background information
 - a. ☐ Mitigation alternatives.
 - b. ☐ Existing wildlife use.
 - c. ☐ Existing soil.
 - d. ☐ Existing vegetation.
 - e. ☐ Surrounding land uses.
 - f. ☐ USFWS and/or NOAA Clearance Letter or Biological Opinion
 - g. ☐ SHPO Cultural Resource Clearance Letter
2. Mitigation proposed
 - a. ☐ Wetland acreage and mitigation type proposed at each site.
 - b. ☐ Wetland classes (e.g., Cowardin, et. al. and hydrogeomorphic classification) proposed at each site.
 - c. ☐ Site specific and landscape level functions and values proposed at each site.
 - d. ☐ Describe nature of any stream mitigation.
 - e. ☐ Reference site(s).
 - f. ☐ Design Constraints
 - g. ☐ Construction oversight.
 - h. ☐ Project construction timing.
 - i. ☐ Responsible parties for all aspects of project.
 - j. ☐ Appropriate financial assurances.
 - k. ☐ Potential to attract waterfowl and other bird species that might pose a threat to aircraft?

D. Hydrology

1. ☐ Evidence of adequate hydrology to support the desired wetland or stream.
 - a. ☐ "Typical" year water budget
 - b. ☐ "Wet" year water budget
 - c. ☐ "Dry" year water budget
2. ☐ Water source(s)
3. ☐ Vernal pool (if any) hydrology is appropriate.

E. Grading Plan

1. Plan View
 - a. ☐ Existing and proposed grading plans.
 - b. ☐ Microtopography
 - c. ☐ Scale is in the range of 1"=20' to 1"=100'.
 - d. ☐ All items on the plan are legible. Electronic documents are encouraged (e.g., Portable Document Format); otherwise plans should be on 8 1/2 x 11" sheets.
 - e. ☐ Plans have a bar scale.
 - f. ☐ The drawings show the access for maintenance and monitoring.
2. ☐ Representative cross-sections
3. ☐ Other - Specific staff recommendations related to grading.

F. Topsoil

1. ☐ Proposed source of topsoil.

2. ☐ Twelve or more inches of natural or manmade topsoil in all wetland mitigation areas.
3. ☐ Appropriate organic content of topsoil.

G. Planting Plan

1. ☐ Plans use scientific names.
2. ☐ Plant materials are native and indigenous to the area of the site(s); invasive species, nonnative species, and/or cultivars are not proposed for planting or seeding.
3. ☐ Vegetation community types or zones are classified in accordance with Cowardin, et al. (1979) or other similar classification system.
4. ☐ Plan view drawings show proposed locations of planted stock.
5. ☐ More than 50% of the plantings in each zone are structural determinants for the community type designated for that zone.
6. ☐ Woody stock density is appropriate.
7. ☐ Herbaceous stock density is appropriate.
8. ☐ Seed mix composition is provided.
9. ☐ Representative cross section plans showing vegetative community zones.
10. ☐ Relocation of plantings allowed when appropriate.
11. ☐ Other - Specific staff recommendations related to planting.

H. Coarse Woody Debris and Other Features

- ☐ Appropriate amounts and range of decomposition of coarse woody debris are proposed.

I. Erosion Controls

- ☐ Erosion control removal deadline is included.

J. Invasive and Noxious Species

1. ☐ Risk – includes evaluation of the potential for unwanted species or varieties
2. ☐ Constraints – regulatory or environmental factors affecting control strategies
3. ☐ Control Plan – addresses a scope commensurate with risk & constraints

K. Off-Road Vehicle Use

1. ☐ No off-road vehicle use in immediate vicinity, or if so, control measures addressed.
2. ☐ Control plan, if appropriate.

L. Preservation

1. ☐ Adequate buffers
2. ☐ Wetlands within subdivisions are protected along with appropriate buffers.
3. ☐ Required preservation language is included.
4. ☐ Plans of preservation area(s).
5. ☐ Form of legal means of preservation
6. ☐ Documentation of acceptance by receiving agency (if applicable)

M. Monitoring Plan

- ☐ Appropriate monitoring is proposed and language included.

N. Assessment Plan

☐ An appropriate assessment plan is proposed and language included.

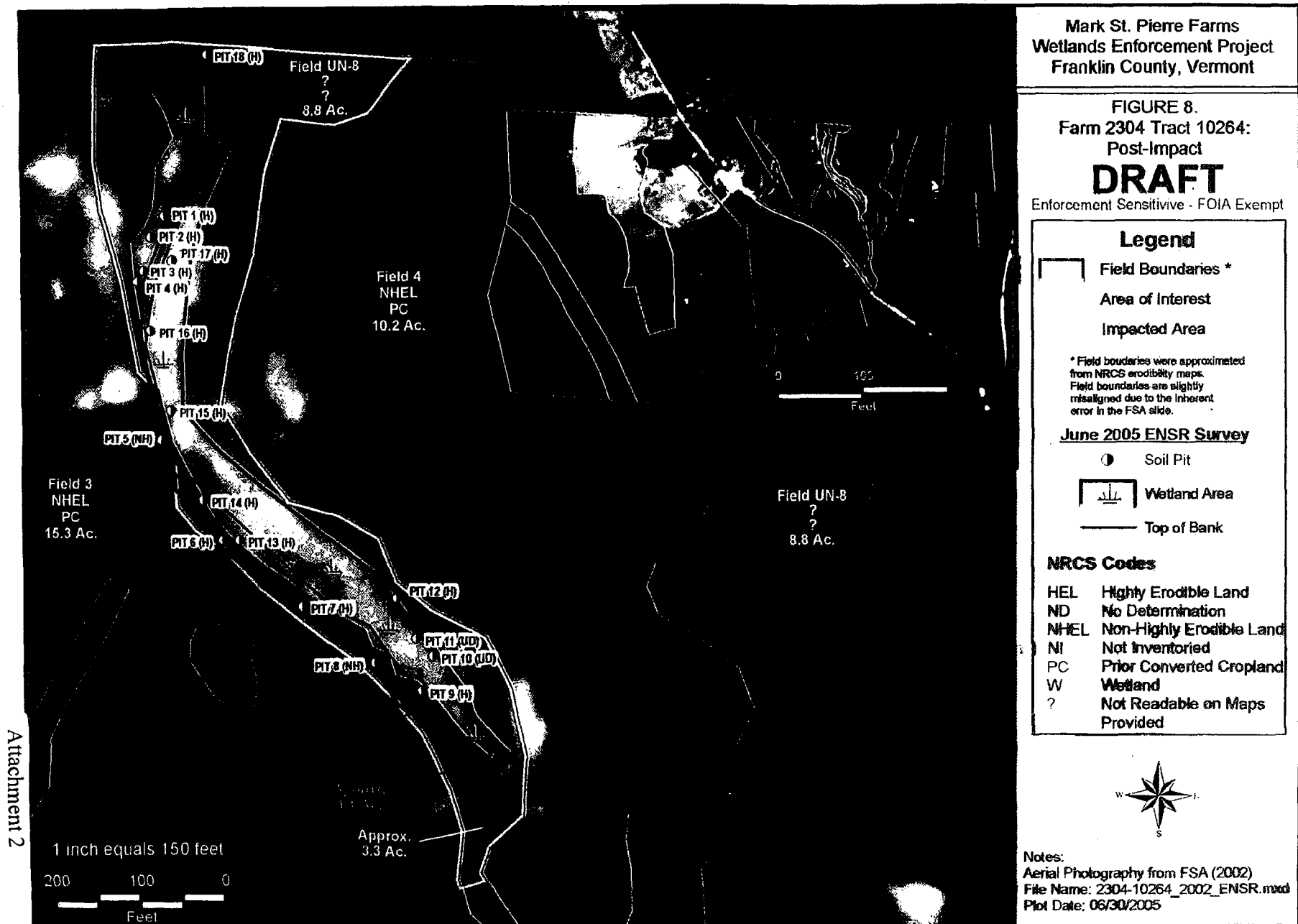
O. Contingency

☐ Plan for dealing with unanticipated site conditions or changes.

P. Long-term Stewardship

☐ Plan for long-term stewardship is included.

Q. Other Comments



**Mark St. Pierre Farms
Wetlands Enforcement Project
Franklin County, Vermont**

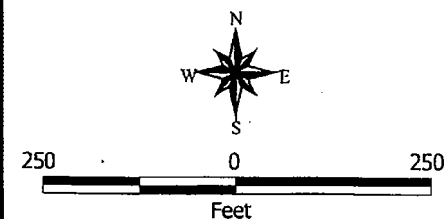
FIGURE 2b.
Tract 1043 : Post-Impact

DRAFT
Enforcement Sensitive - FOIA Exempt

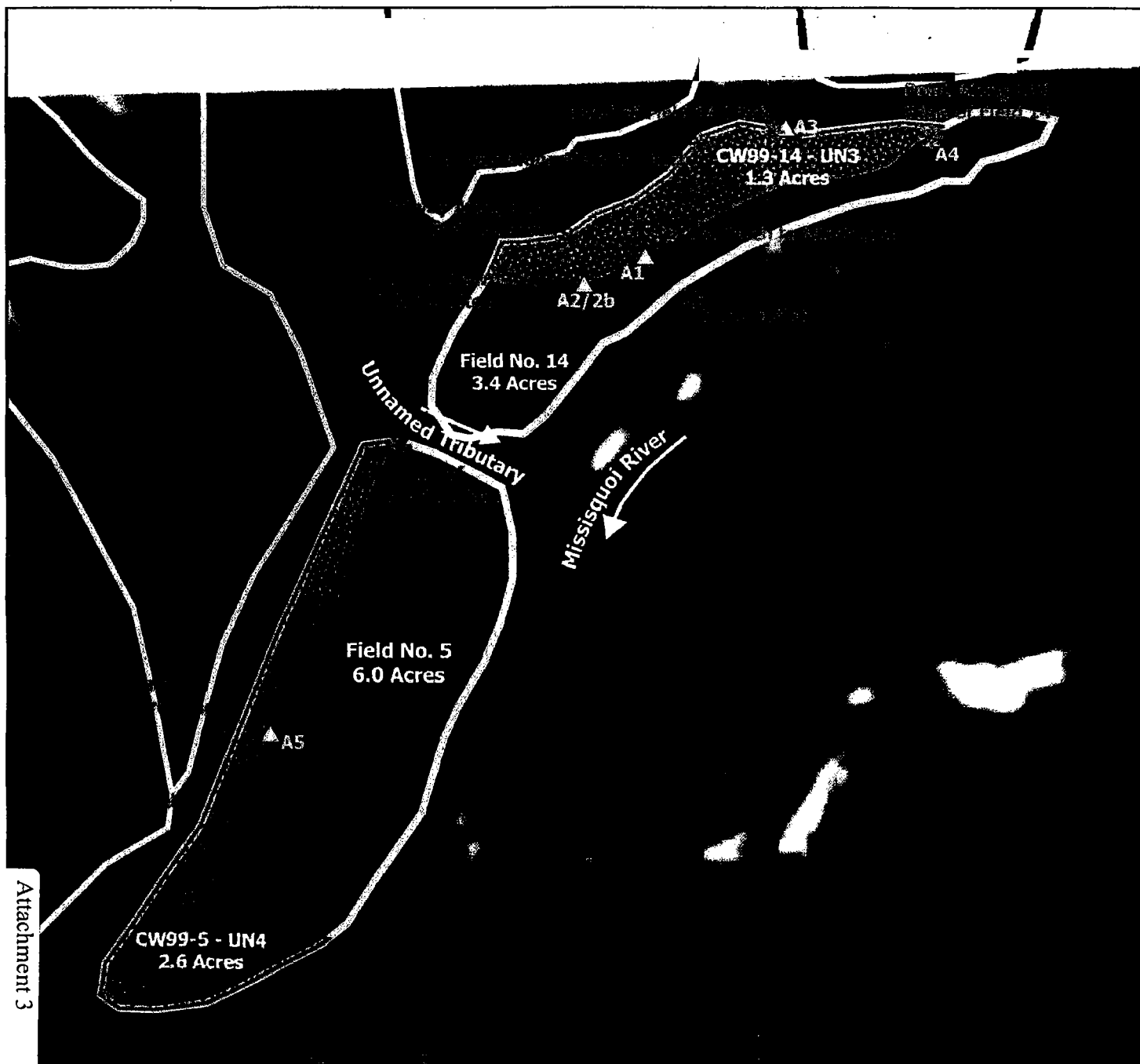
Legend

- * Site Feature
- 2001 Soil Sample Locations
- △ Hydric Soil
- Field Boundaries Shown in the NRCS Report**
- Converted Wetland**

**Polygons were approximated from a 1999 NRCS report and confirmed by SAIC in 2001.



Notes:
Aerial Photography from FSA (2001)
Soil and Feature GPS Data collected by SAIC (August, 2001)
Compiled and Printed on 02-03-03
p:/Enforcement Cases/EPA/Vermont Wetlands GIS/Projects



**Mark St. Pierre Farms
Wetlands Enforcement Project
Franklin County, Vermont**

FIGURE 5b.
Tract 9970 North : Post-Impact

DRAFT

Enforcement Sensitive - FOIA Exempt

Legend

- * Site Feature
- 2001 Soil Sample Locations
- ▲ Hydric Soil
- Non-hydric Soil

Field Boundaries Shown
in the NRCS Report*

Converted Wetland**

*Polygons were approximated
from a 1999 NRCS report.

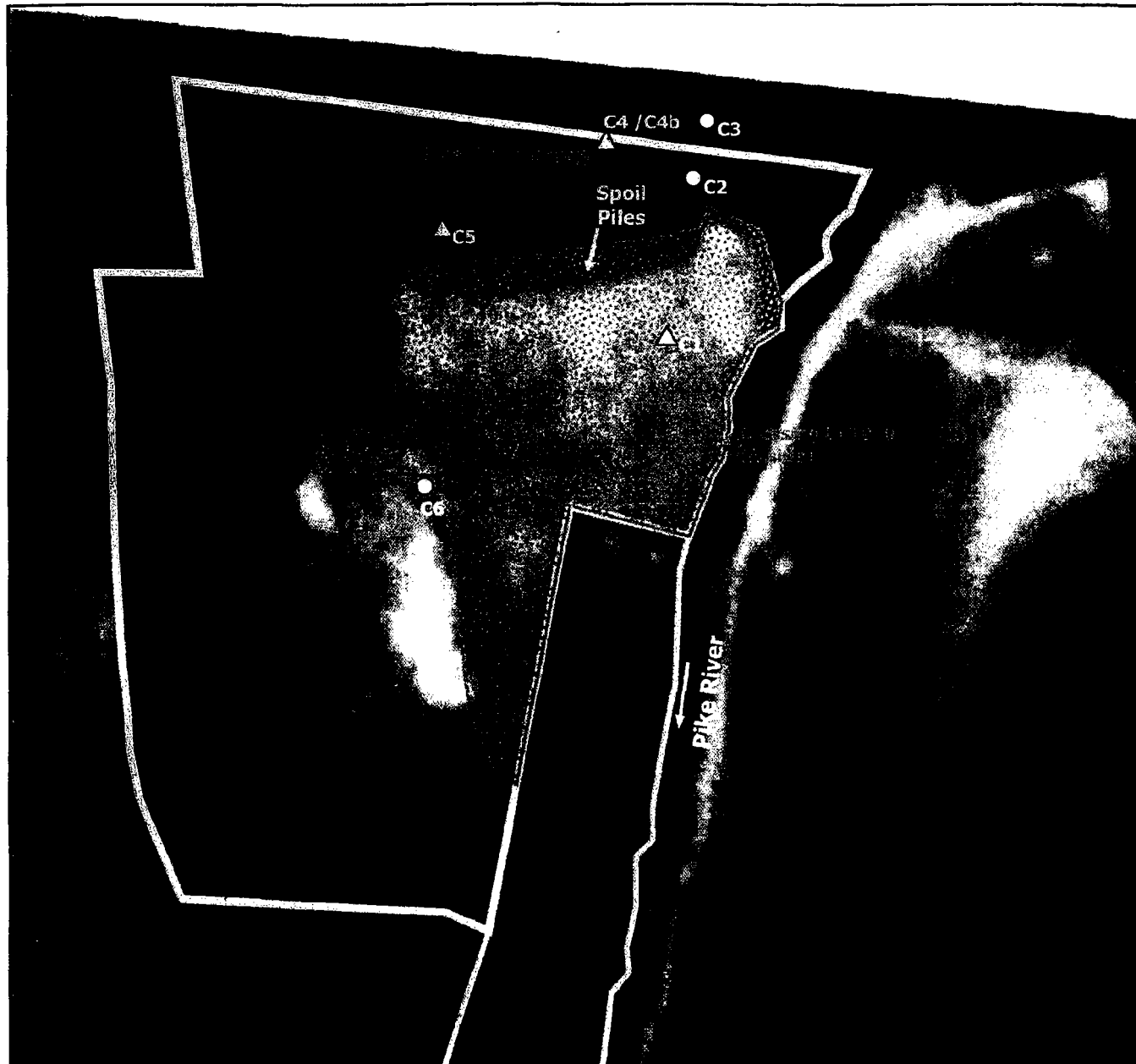
**Converted wetlands were
approximated from a 1999
NRCS report and confirmed
by SAIC in 2001.



250 0 250
Feet

SAIC
AN ENVIRONMENTAL CORPORATION

Notes:
Aerial Photography from FSA (2000)
Soil and Feature GPS Data collected by SAIC
(August/September, 2001)
Compiled and Printed on 06-25-02
M:/Enforcement Cases/EPA/Vermont Wetlands GIS/Projects



**Mark St. Pierre Farms
Wetlands Enforcement Project
Franklin County, Vermont**

FIGURE 6b.
Tract 9970 South : Post-Impact

DRAFT

Enforcement Sensitive - FOIA Exempt

Legend

--- New Ditches*

2001 Soil Sample Locations

△ Hydric Soil*

Field Boundaries Shown
in the NRCS Report**

Identified Wetland
Areas**

Converted Wetland**

*Soil sample and ditch
locations approximated

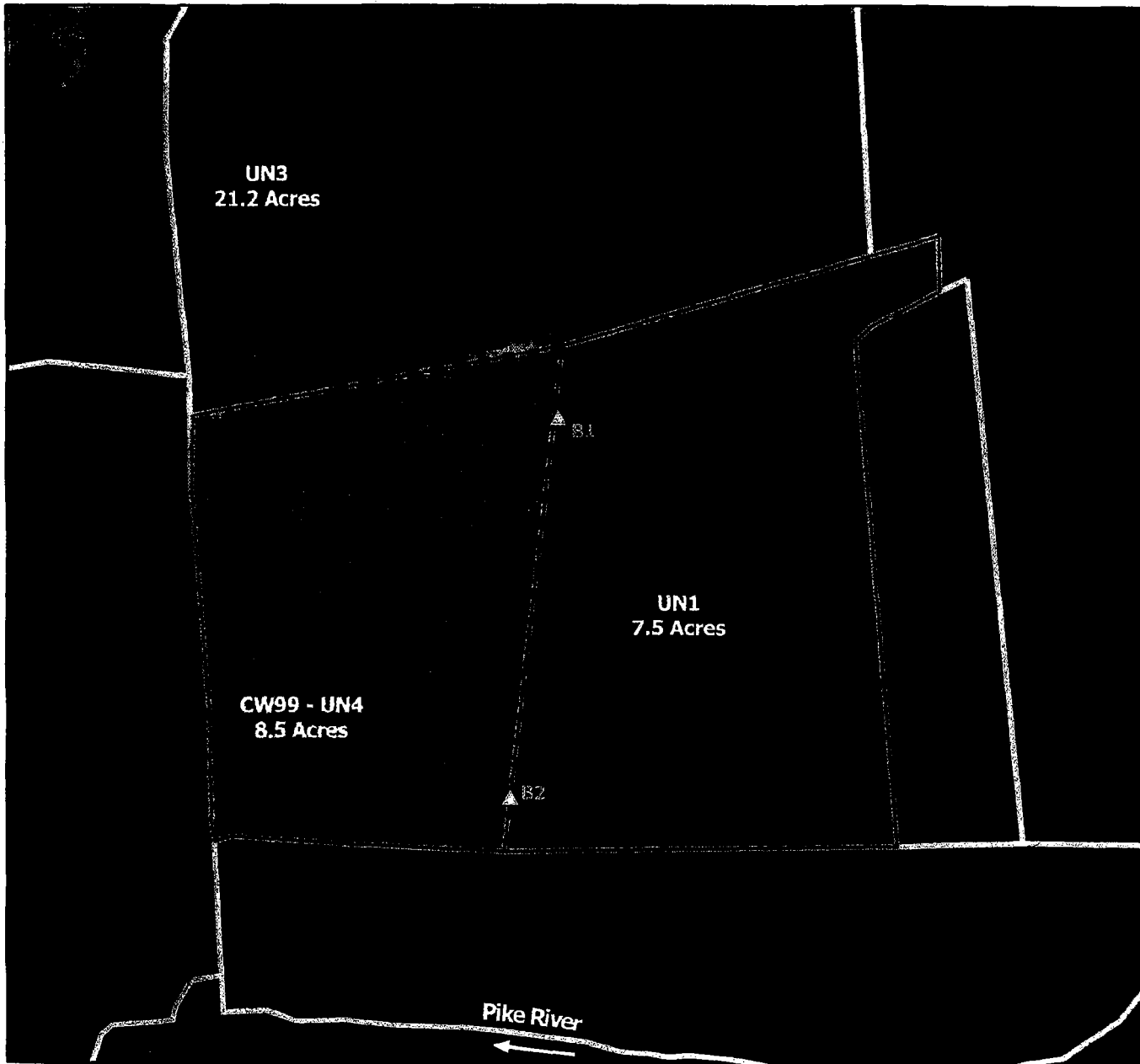
**Polygons were approximated
from a 1999 NRCS report and
confirmed by SAIC in 2001.



250 0 250
Feet



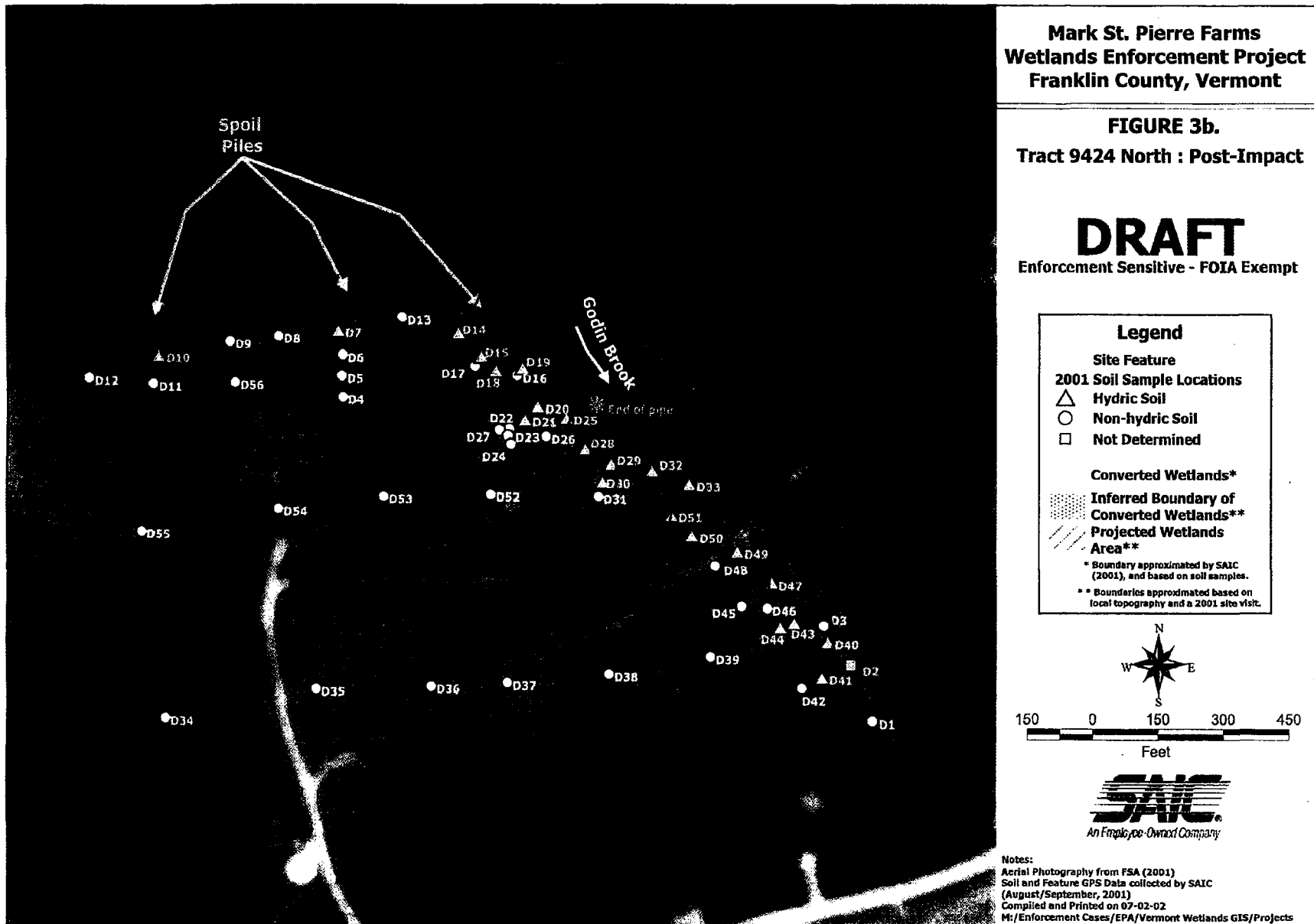
Source:
Aerial Photography from FSA (2000)
Soil and Ditch Data Collected by SAIC (August, 2001)
Compiled and Printed on 06-25-02
M:/Enforcement Cases/EPA/Vermont Wetlands GIS/Projects



**Mark St. Pierre Farms
Wetlands Enforcement Project
Franklin County, Vermont**

FIGURE 3b.
Tract 9424 North : Post-Impact

DRAFT
Enforcement Sensitive - FOIA Exempt



**Mark St. Pierre Farms
Wetlands Enforcement Project
Franklin County, Vermont**

FIGURE 4b.
Tract 9424 South : Post-Impact

DRAFT
Enforcement Sensitive - FOIA Exempt

Legend

- Site Feature**
2001 Soil Sample Locations
△ Hydric Soil
○ Non-hydric Soil
□ Not Determined

Converted Wetlands*

**Projected Wetlands
Area****

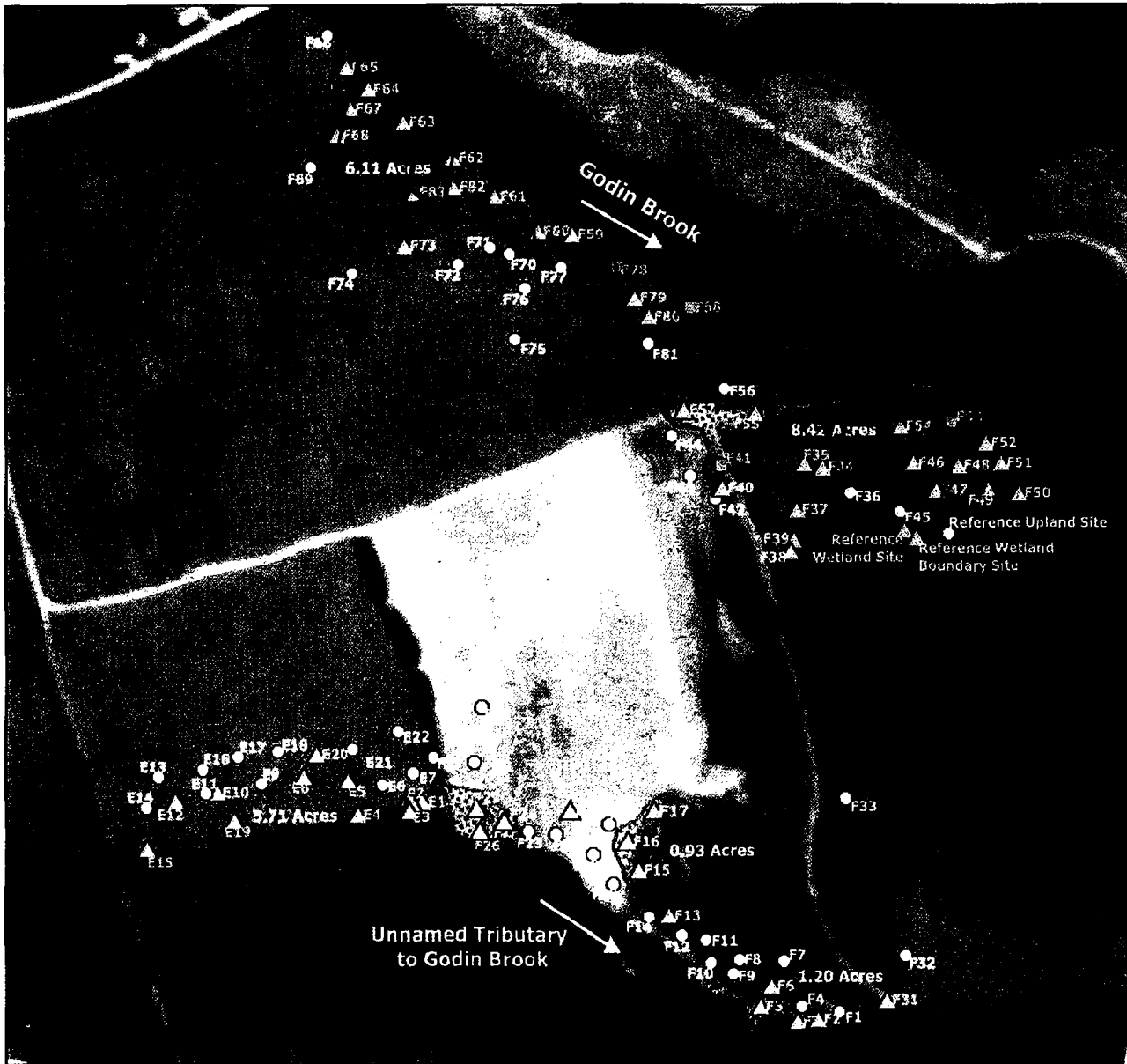
- * Boundary approximated by SAIC (2001), and based on soil samples.
- ** Boundaries approximated based on local topography and a 2001 site visit.

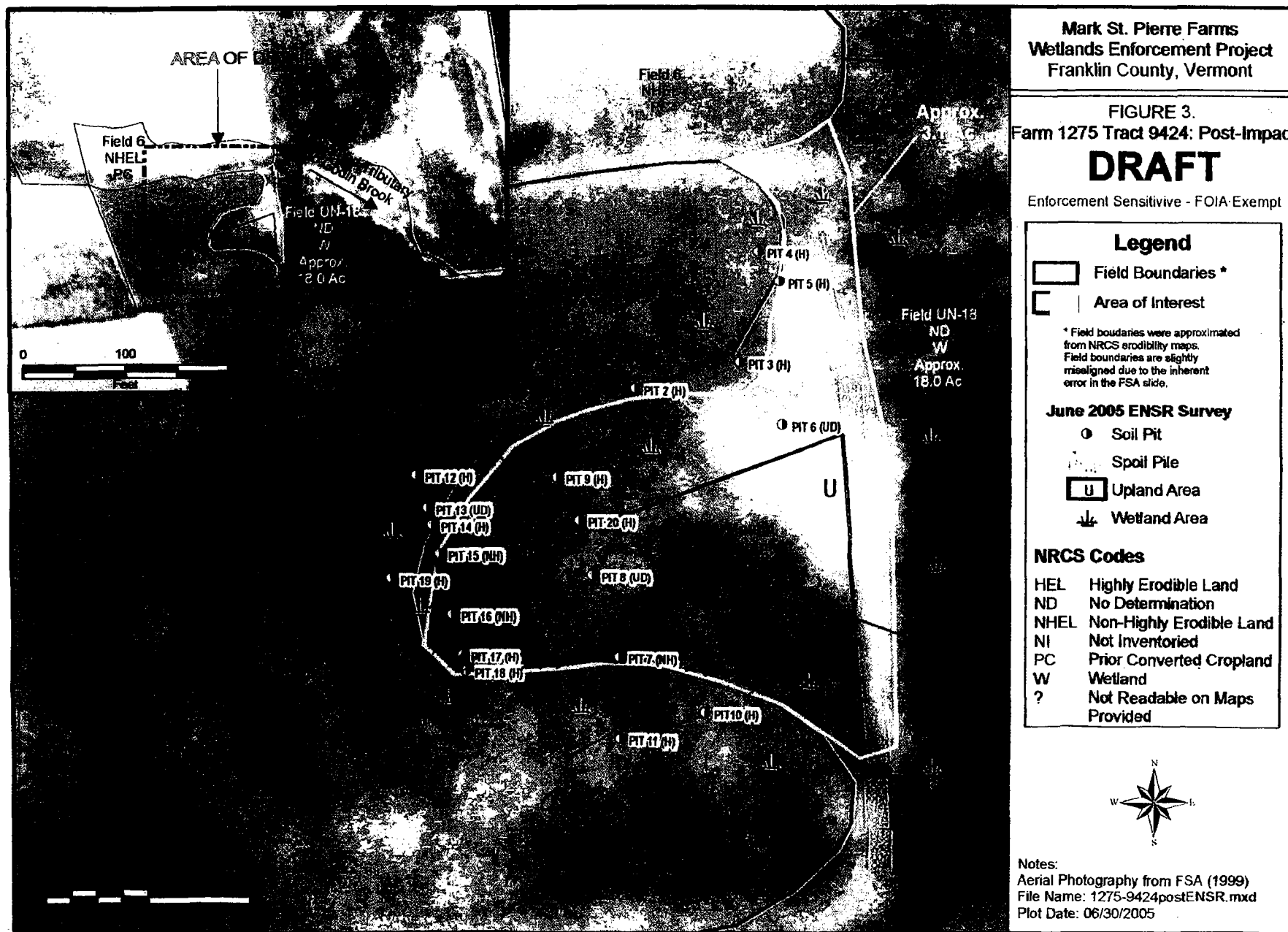


250 0 250 500
Feet



Notes:
Aerial Photography from NAPP (May 12, 1992)
Soil and Feature GPS Data collected by SAIC
(August/September, 2001)
Compiled and Printed on 07-02-02
M:/Enforcement Cases/EPA/Vermont Wetlands GIS/Projects







Conservation Plan Map New Determinations



Legend

- Tract Boundary
- Tract # 9970 Field Boundary
- Tract # 9970 Field Labels
- Wetland Areas

APPENDIX III

DRAFT CONSERVATION EASEMENT

THIS CONSERVATION EASEMENT is made this ____ day of ____, 2008 by and between Mark and Amanda St. Pierre ("Grantor" or "the St. Pierres") who reside at [address], and the Franklin County Natural Resources Conservation District ("Holder" or "the District"), an agency organized and existing under the laws of the State of Vermont with a mailing address of [fill in].

IN CONSIDERATION OF THE FOLLOWING FACTS:

The St. Pierres hold title to a certain parcel of land situated along the Mississquoi River, in the Town of Richford, Franklin County, Vermont, described in a deed to the St. Pierres from ____, dated ____ 20 ____, and recorded at Book ____ and Page ____ at ____ County, Vermont, Registry of Deeds, which includes a 9.4 acre portion (the "Protected Property"), as shown on Exhibit A and described in Exhibit B; and

This Conservation Easement is created pursuant to [Vermont law]; and

The District is qualified to accept and hold conservation easements pursuant to [Vermont law] for the purpose of preserving and protecting natural, scenic, educational, recreational and open space values of real property; and

The St. Pierres and the District agree that the United States Environmental Protection Agency (the "Third Party Enforcer" or "EPA"), located at One Congress Street, Boston, MA 02114, shall have a third party right of enforcement; and

[Each existing mortgage holder] has consented to this Conservation Easement and has agreed that its mortgage interest is subject to and bound by the terms of this Conservation Easement, as required by applicable Treasury Regulations; and

The Protected Property is comprised of wetlands, which possess ecological, natural, and aesthetic values, including habitat values for wildlife and plants, sediment removal, nutrient removal and transformation, and flood water and runoff storage, and values for passive recreation; and

Development of the Protected Property beyond that permitted in this Conservation Easement would have an adverse effect on the ecological, natural, recreational, and aesthetic values; and

The St. Pierres and the District are willing to provide to the public, access and use on, over and through the Protected Property; and

The St. Pierres and the District, recognizing the importance of the Protected Property for conservation, have the common purpose of conserving the ecological, natural, recreational, and aesthetic values of the Protected Property by the conveyance of a Conservation Easement on, over, and across the Protected Property; and

Preservation of the Protected Property is consistent with federal, state, and local governmental conservation policy, and will yield a significant public benefit to the people of Franklin County and Vermont,

NOW THEREFORE, the St. Pierres hereby grant to the District and its successors and assigns forever, as an absolute and unconditional gift, a Conservation Easement over the Protected Property. The Conservation Easement consists of the following affirmative rights, terms, covenants and restrictions, that will run with the Protected Property forever and be binding on the St. Pierres and their successors and assigns forever:

PURPOSE OF THIS CONSERVATION EASEMENT

It is the dominant purpose of this Conservation Easement to preserve and protect in perpetuity the natural, scenic, wildlife, recreational, and other ecological values of the Protected Property

AFFIRMATIVE RIGHTS OF THE DISTRICT

- A. The District has the right to preserve and protect forever the ecological, natural, scenic, recreational, and wildlife habitat values of the Protected Property.
- B. The District has the right to enforce the terms of this Conservation Easement (including the right to require the restoration of the Protected Property, at the St. Pierres' cost, to its condition as of the date of this grant, subject to any permitted changes made subsequently).
- C. The District has the right to enter upon the Protected Property, for inspection and enforcement purposes, after making reasonable efforts to provide advance notice to the owners, at any reasonable time and in any reasonable manner not inconsistent with the conservation purposes of this Conservation Easement.
- D. The District has the right to restrict or limit any activity or use of the Protected Property not otherwise prohibited below if it is unnecessarily detrimental to the conservation values to be protected by this Conservation Easement.
- E. The District has the right to hold this Conservation Easement forever and to transfer it, but only to an entity that satisfies the requirements of Section 170(h) of the Internal Revenue Code of 1986 and Treasury Regulations of Section 1.170A-14(c)(1), as amended (or successor provisions thereof), and [corresponding requirements of Vermont law regarding conservation easements].
- F. The District has the right to conduct, at the St. Pierres' cost, a professional survey on the Protected Property, if necessary to determine compliance with the terms of this Conservation Easement.

TERMS, COVENANTS AND RESTRICTIONS

1. LAND USE

A. Neither the St. Pierres nor their successors and assigns will perform the following acts or authorize or allow others to perform them, except as may be required by the terms of a consent decree entered in Federal District Court for the District of Vermont on _____, 2008, Docket No. _____, between the St. Pierres and the United States on behalf of EPA:

1. No soil, loam, peat, sand, gravel, concrete, rock or other mineral substance, refuse, trash, vehicle bodies or parts, rubbish, debris, junk, waste, pollutants or other fill material shall be placed, stored or dumped on the Protected Property, nor shall the topography of the Protected Property be altered or manipulated in any way;
2. No trees, grasses, shrubs, vines, or other vegetation shall be cut, destroyed, or sprayed with pesticides, except that clearing is allowed for the removal of dead wood and blow-downs, for the protection of human safety, for the establishment and maintenance of any path or trail, and as necessary for ensuring the health of forested areas;
3. No ditches shall be dug, and no draining of the Protected Property shall take place, and no pumping or any other removal of water shall occur on the Protected Property, nor shall the manipulation or alteration of natural water courses or hydrology occur;
4. No crops shall be planted or harvested on the Protected Property;
5. No trucks, cars, bulldozers, backhoes, mechanical equipment, or other vehicles shall be permitted on the Protected Property; and
6. No building, sign (other than signs erected by the St. Pierres or the District identifying the District as the holder of this Conservation Easement or signs limiting public access to the Protected Property), fence (other than fences that do not interfere with the purpose of this Conservation Easement), utility pole, exterior high intensity lights, antenna or apparatus for telecommunication or radar, or other temporary or permanent structure shall be constructed, placed or permitted to remain on the Protected Property.

B. The St. Pierres shall post the Protected Property with signs to discourage the use of ATVs, dirt bikes.

C. The St. Pierres may allow public access and use on, over and through the Protected Property provided such use is limited to passive outdoor recreation, including but not limited to hiking, swimming, fishing, cross country skiing, and other forms of outdoor recreation which have minimal impact on the natural and ecological character of the Protected Property conducted in conformance with all applicable laws and regulations concerning such activities.

D. The St. Pierres and/or the District may control and prohibit, by posting and other means, overnight camping, open fires, and any use by the public which may have an adverse impact on the natural values to be conserved by this Conservation Easement, and any use which is destructive or offensive to other members of the public using the public access areas, or to the reasonable quiet enjoyment and use of the Protected Property and neighboring lands by owners, residents, and guests.

E. Regardless of any public use of the Protected Property, the St. Pierres and the District do not have any obligation to the public to maintain this Conservation Easement, and permission to the public to use the Protected Property does not convey any rights to the public. The St. Pierres and the District do not assume any liability to the general public for accidents, injuries, acts, or omissions beyond the standard of care owed or beyond the limitations of liability for injury to the public under [Vermont law].

F. Any activity on or use of the Protected Property inconsistent with the purpose of this Conservation Easement is prohibited.

2. BOUNDARIES

The St. Pierres and the District acknowledge that the Protected Property has been surveyed in advance of this grant.

3. RESERVED RIGHTS OF THE ST. PIERRES

The St. Pierres reserve to themselves and to their successors and assigns, all rights related to their ownership of the Protected Property, including the right to engage in all lawful uses of the Protected Property that are not expressly prohibited above and are not inconsistent with the purposes of this Conservation Easement.

[Please consider the appropriateness of an additional line regarding the Town water easement.]

The St. Pierres reserve the right to sell, give, or otherwise convey the Protected Property, subject to the terms of this Conservation Easement [which will run with the Protected Property forever] and the consent decree entered on [Date, 2008], Docket No. [blank] between the St. Pierres and the United States on behalf of EPA.

The St. Pierres shall not be liable for any duties or obligations under this Conservation Easement after conveyance of the Protected Property, except for harm caused by the St. Pierres during their ownership of the Protected Property.

4. MONITORING AND ENFORCEMENT

The District has the right to assure that the condition of the Protected Property complies with all of the terms of the Conservation Easement. In connection with such efforts, the District has the right, after making reasonable efforts to provide advance written notice to owners of the Protected Property, to enter the Protected Property at reasonable times and in a reasonable manner to make periodic inspections. The District agrees to keep on file and make available to the St. Pierres any notes or reports made in connection with inspections of the Protected Property.

If the District determines that a violation of this Conservation Easement has occurred or is about to occur, it has the right to notify the St. Pierres, or their successors or assigns, in writing and to

demand that the violation be stopped and that steps be taken to restore the Protected Property to its condition at the time of this grant, except for permitted changes made subsequently and changes resulting from "acts of God," "acts of war," unauthorized wrongful acts of a third party, or any prudent action taken by the St. Pierres under emergency conditions to prevent, lessen, or remedy significant injury to the Protected Property resulting from such causes.

If the St. Pierres fail within a reasonable time to comply with the requirement of the District's written notice, the District may pursue its remedies in court to enforce the terms of this Conservation Easement, to recover damages and to obtain injunctive relief, including an order requiring restoration, at the St. Pierres' cost. If there is a threat of imminent harm to the conservation purposes of this Conservation Easement, the District need not provide written notice and may immediately pursue its remedies in court after making reasonable efforts to contact the St. Pierres.

If a Court determines that this Conservation Easement has been violated, the St. Pierres will reimburse the District for any reasonable costs of enforcement, including court costs, reasonable attorney's fees and any other payments ordered by the Court. Any monetary damages recovered shall be used by the District to implement corrective action on the Protected Property, if necessary. Nothing herein should be construed to preclude the St. Pierres' and the District's rights to recover damages from a third party for trespass or other violation of their respective rights in this Conservation Easement and the Protected Property. The failure or delay of the District, for any reason, to enforce any of the provisions of this Conservation Easement is not a waiver of its right to enforce any provision of the Conservation Easement.

5. RIGHTS OF THIRD PARTY ENFORCER

EPA shall have the right, in a reasonable manner and at reasonable times, after giving reasonable notice to the St. Pierres, or their successors or assigns, to enter the Protected Property to ensure compliance with this Conservation Easement. EPA shall also have the right to enforce in court the terms of the Conservation Easement, including but not limited to the right to require the Protected Property to be restored to its previous condition. If a Court determines that this Conservation Easement has been violated, the St. Pierres will reimburse EPA for any reasonable costs of enforcement, including court costs, reasonable attorney's fees and any other payments ordered by such Court.

Nothing herein shall be construed to limit EPA's ability to exercise its authority pursuant to applicable law, including bringing an action against the St. Pierres pursuant to such law. However, this Conservation Easement does not permit EPA to bring an action against the St. Pierres or their successors or assigns for any changes to the Protected Property due to causes beyond the the St. Pierres' control, such as changes resulting from "acts of God," "acts of war," unauthorized wrongful acts of a third party, or any prudent action taken by the St. Pierres under emergency conditions to prevent, lessen, or remedy significant injury to the Protected Property resulting from such causes.

EPA's discretionary decision not to enforce the terms of this Conservation Easement will not be construed as a waiver of its right to enforce the Conservation Easement. EPA does not waive or

forfeit the right to take action to ensure compliance with the Conservation Easement by any prior failure to act.

6. GRANT IN PERPETUITY AND TRANSFERS OF OWNERSHIP

This Conservation Easement is a burden upon the Protected Property that will run with the Protected Property forever and bind the St. Pierres and their successors and assigns forever. This Conservation Easement and any amendment or transfer of it must be recorded at the Franklin County Registry of Deeds.

The St. Pierres and their successors and assigns shall have the right to transfer, lease or sell the Protected Property. The St. Pierres must advise the District and EPA in writing at least thirty (30) days in advance of any such action. Any costs incurred by the District as a result of the St. Pierres' failure to notify the District of transfer, sale, assignment, or lease of the Protected Property will be paid by the St. Pierres. The failure of the St. Pierres, or their successors or assigns, to give the notice required by this paragraph shall not impair the validity of such transfer or limit its enforceability in any way. This Conservation Easement must be incorporated by reference in any subsequent deed or legal instrument by which the St. Pierres convey any interest (including a leasehold) in the Protected Property.

7. CHANGES IN PROPERTY USE

Before making changes in the use of the Protected Property, the St. Pierres, or their successors and assigns, shall consult with the District regarding the proposed changes to determine the effect of such changes on the conservation values of the Protected Property. The District, in consultation with EPA, shall have the right to approve such changes in use if they do not impair or impede the conservation values of the Protected Property or the purpose of this Conservation Easement, or to disapprove such changes. Such approval or disapproval shall be in writing and shall not to be unreasonably withheld. Changes will take effect upon recording at the Franklin County Registry of Deeds. The District and the St. Pierres have no right or power to agree to any change that would limit the term or result in termination of this Conservation Easement or that would cause it to fail to qualify as a valid easement under [Vermont law].

8. COSTS AND TAXES; INDEMNIFICATION

The St. Pierres, and their successors and assigns, remain obligated to pay any real estate taxes or other assessments levied by competent authorities on the Protected Property and to relieve the District and EPA from any duty or responsibility to maintain the Protected Property.

The St. Pierres retain all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep and/or maintenance of the Protected Property, including the maintenance of adequate comprehensive general liability insurance coverage.

The St. Pierres recognizes that the District has not, by accepting this Conservation Easement, acquired any management rights or obligations for the land.

The St. Pierres will defend the District and does hereby, to the fullest extent permitted by law, release, relieve, hold harmless and indemnify the District, its officers, directors, agents, and employees, from any claims for damages which may be brought against the District, and from any losses, expenses, damages, penalties, fees or costs (including legal fees) imposed upon or incurred by the District by reason of loss of life, personal injury and/or damage to property occurring in or around the Protected Property, except as may arise from the negligence or misconduct of the District, its officers, directors, agents, employees, successors or assigns arising out of and occurring in the discharge of the District's obligations hereunder.

9. SUBSEQUENT TRANSFEREES

The District has the right to hold this Conservation Easement forever and to transfer the same, but only to an entity that satisfies the requirements of Section 170(h) of the Internal Revenue Code of 1986 and Treasury Regulations of Section 1.170A-14(c)(1), as amended (or successor provisions thereof), and [certain Vermont law requirements]. If the District should cease to exist as an organization or cease to be an organization that meets the requirements of Section 170(h) of the Internal Revenue Code of 1986 and Treasury Regulations of Section 1.170A-14(c)(1), as amended (or successor provisions thereof), and [same certain Vermont requirements], it is the intention of the St. Pierres that this Conservation Easement be transferred to such other organization, that meets the requirements of Section 170(h) of the Internal Revenue Code of 1986 and Treasury Regulations of Section 1.170A-14(c)(1), as amended (or successor provisions thereof), and [same certain Vermont requirements], as may be designated by the Attorney General of the State of Vermont, in the capacity of custodian of charitable trusts, in consultation with EPA, or as designated under the doctrine of *cy pres* by a court of competent jurisdiction.

10. CONTROLLING LAW

The interpretation and performance of this Conservation Easement shall be governed by the laws of the State of Vermont. This Conservation Easement shall be liberally construed in favor of the grant to effect the purpose of this Conservation Easement.

11. MISCELLANEOUS

A. If any provision of this Conservation Easement or its application to any person or circumstance is found to be invalid, the remainder of the provisions of this Conservation Easement, and its application to other persons or circumstances, shall not be affected.

B. Any notice, demand, request, consent, approval or any other communication that either party desires to give to the other regarding the Protected Property shall be in writing and shall be sent via certified mail addressed as follows:

To Grantor:

Mark and Amanda St. Pierre
[Address]

To Holder:

Franklin County Natural Resource Conservation District
[Address]

To Third Party Enforcer:

U.S. Environmental Protection Agency, Region I
Wetlands Enforcement Section
One Congress Street
Boston, MA 02114

C. Should it be necessary in the future for the District to provide notice to the Grantor in connection with any matter relating to this Conservation Easement, notice to the record owner or owners, who are of full age and competent, of a majority interest in the Protected Property, or of a majority interest in each lot or parcel on the Protected Property if they are in separate ownership, shall be deemed notice to all the owners of the Protected Property. In the event that the Protected Property, or any portion is owned by a partnership, trust or corporate entity, notice to one general partner; the trustee or the registered agent, shall be deemed notice to all owners of the relevant portion. Any consent, agreement or approval made in writing by the person or persons to whom notice is required as aforesaid shall be deemed the consent, agreement or approval of Grantor and are binding on all owners of the Protected Property.

ATTACHMENTS:

Exhibit A - a perimeter map of the Protected Property

Exhibit B - a perimeter deed description of the Protected Property

APPENDIX IV

STATE OF VERMONT

FRANKLIN COUNTY

DECLARATION OF CONSERVATION CONDITIONS AND RESTRICTIONS

THIS DECLARATION OF CONSERVATION CONDITIONS AND RESTRICTIONS ("Declaration") is made this ___ day of ___, 2008 by Mark and Amanda St. Pierre ("Declarants") who reside at [address].

RECITALS AND CONSERVATION PURPOSES

A. Declarants hold title to, and are the sole owners in fee simple to, a certain parcel of land situated along the Mississquoi River, in the Town of Richford, Franklin County, Vermont, described in a deed to the Declarants from ___, dated ___ 20___, and recorded at Book ___ and Page ___ at ___ County, Vermont, Registry of Deeds, which includes a 9.4 acre portion (the "Protected Property"), as shown on Exhibit A and described in Exhibit B; and

B. The Protected Property is comprised of wetlands which possess ecological, natural, and aesthetic values, including habitat values for wildlife and plants, sediment removal, nutrient removal and transformation, and flood water and runoff storage, and values for passive recreation; and

C. Development of the Protected Property beyond that permitted in this Declaration would have an adverse effect on the ecological, natural, recreational, and aesthetic values; and

D. Declarants are willing to provide to the public, access and use on, over and through the Protected Property; and

E. Declarants, recognizing the importance of the Protected Property for conservation, have the purpose of conserving the ecological, natural, recreational, and aesthetic values of the Protected Property by the establishment of a Declaration governing the use and enjoyment on, over, and across the Protected Property; and

F. Preservation of the Protected Property is consistent with federal, state and local governmental conservation policy, and will yield a significant public benefit to the people of Franklin County and Vermont; and

G. The purpose of this Declaration is to maintain wetland and/or riparian resources and other natural values of the Protected Property, and prevent the use or development of the

Protected Property for any purpose or in any manner that would conflict with the maintenance of the Protected Property in its natural condition. The preservation of the Protected Property in its natural condition is part of the supplemental environmental project agreed to by the Declarants under the Consent Decree dated _____, 2008 to resolve their violation of the Clean Water Act – Civil Action No. _____, and the restrictions in this Declaration may be enforced by the United States of America in conjunction with its enforcement of that Consent Decree:

NOW THEREFORE, the Declarants hereby unconditionally and irrevocably declare that the Protected Property shall be held and subject to the following restrictions and conditions as set out herein, to run with the subject real property and be binding on the Declarants and their successors and assigns that have or shall have any right, title, or interest in said Protected Property.

ARTICLE I. PURPOSE OF THIS DECLARATION

It is the dominant purpose of this Declaration to preserve and protect in perpetuity the natural, scenic, wildlife, recreational, and other ecological values of the Protected Property.

ARTICLE II. PROHIBITED AND RESTRICTED ACTIVITIES

1. LAND USE

A. Neither the Declarants nor their successors and assigns will perform the following acts or authorize or allow others to perform them, except as may be required by the terms of the Consent Decree entered in Federal District Court for the District of Vermont and dated _____, 2008, Docket No. _____, between the Declarants and the United States on behalf of the United States Environmental Protection Agency (“EPA”):

1. No soil, loam, peat, sand, gravel, concrete, rock or other mineral substance, refuse, trash, vehicle bodies or parts, rubbish, debris, junk, waste, pollutants or other fill material shall be placed, stored or dumped on the Protected Property, nor shall the topography of the Protected Property be altered or manipulated in any way;
2. No trees, grasses, shrubs, vines, or other vegetation shall be cut, destroyed, or sprayed with pesticides, except that clearing is allowed for the removal of dead wood and blow-downs, for the protection of human safety, for the establishment and maintenance of any path or trail, and as necessary for ensuring the health of forested areas;
3. No ditches shall be dug, and no draining of the Protected Property shall take place, and no pumping or any other removal of water shall occur on the Protected Property, nor shall the manipulation or alteration of natural water courses or hydrology occur;
4. No crops shall be planted or harvested on the Protected Property;
5. No trucks, cars, bulldozers, backhoes, mechanical equipment, or other vehicles shall be permitted on the Protected Property; and
6. No building, sign (other than signs erected by the Declarants limiting public access to the

Protected Property), fence (other than fences that do not interfere with the purpose of this Declaration), utility pole, exterior high intensity lights, antenna or apparatus for telecommunication or radar, or other temporary or permanent structure shall be constructed, placed or permitted to remain on the Protected Property.

B. The Declarants shall post the Protected Property with signs to discourage the use of ATVs and dirt bikes.

C. The Declarants may allow public access and use on, over and through the Protected Property provided such use is limited to passive outdoor recreation, including but not limited to hiking, swimming, fishing, cross country skiing, and other forms of outdoor recreation which have minimal impact on the natural and ecological character of the Protected Property conducted in conformance with all applicable laws and regulations concerning such activities.

D. The Declarants may control and prohibit, by posting and other means, overnight camping, open fires, and any use by the public which may have an adverse impact on the natural values to be conserved by this Declaration, and any use which is destructive or offensive to other members of the public using the public access areas, or to the reasonable quiet enjoyment and use of the Protected Property and neighboring lands by owners, residents, and guests.

E. Regardless of any public use of the Protected Property, the Declarants do not have any obligation to the public to allow access to the Protected Property and permission to the public to use the Protected Property does not convey any rights to the public. The Declarants do not assume any liability to the general public for accidents, injuries, acts, or omissions beyond the standard of care owed or beyond the limitations of liability for injury to the public under [Vermont law].

F. Any activity on or use of the Protected Property inconsistent with the purpose of this Declaration is prohibited.

2. BOUNDARIES

The Declarants acknowledge that the Protected Property has been surveyed in advance of this grant.

3. RESERVED RIGHTS OF THE DECLARANTS

The Declarants reserve to themselves and to their successors and assigns, all rights related to their ownership of the Protected Property, including the right to engage in all lawful uses of the Protected Property that are not expressly prohibited above and are not inconsistent with the purposes of this Declaration.

The Declarants reserve the right to sell, give, or otherwise convey the Protected Property, subject to the terms of this Declaration and the Consent Decree entered on _____, 2008, Docket No. _____, between the Declarants and the United States on behalf of EPA.

The Declarants shall not be liable for any duties or obligations under this Declaration after conveyance of the Protected Property, except for harm caused by the Declarants during their ownership of the Protected Property.

4. RESTRICTION IN PERPETUITY AND TRANSFERS OF OWNERSHIP

This Declaration is a burden upon the Protected Property that will run with the Protected Property forever and bind the Declarants and their successors and assigns forever. Declarants shall record this Declaration and any amendment of it in the official records of Franklin County, Vermont and may re-record it at any time as may be required to preserve the restriction.

The Declarants and their successors and assigns shall have the right to transfer, lease or sell the Protected Property. The Declarants and their successors and assigns must advise the EPA in writing at least thirty (30) days in advance of any such action. Any notice to EPA under this paragraph shall identify the mailing address(es) of the person(s) to whom the Protected Property is being transferred, leased or sold. The failure of the Declarants, or their successors or assigns, to give the notice required by this paragraph shall not impair the validity of such transfer or limit its enforceability in any way. This Declaration must be incorporated by reference in any subsequent deed or legal instrument by which the Declarants convey any interest (including a leasehold) in the Protected Property. It is the intention of the Declarants that these restrictions herein are to run with the land and shall be binding on the Declarants and their successors and assigns.

In any instrument conveying any interest in any portion of the Protected Property, including but not limited to deeds, leases and mortgages, Declarants shall include a notice which is in substantially the following form:

NOTICE: THE INTEREST CONVEYED HEREBY IS
SUBJECT TO A DECLARATION OF RESTRICTIONS DATED _
_____, 200_, RECORDED IN THE PUBLIC LAND
RECORDS ON _____, 200_, IN BOOK __, PAGE __,
PURSUANT TO A CONSENT DECREE ENTERED IN
FEDERAL DISTRICT COURT FOR THE DISTRICT OF
VERMONT AND DATED _____, 200_, DOCKET NO.
_____, BETWEEN THE DECLARANTS AND THE
UNITED STATES ON BEHALF OF THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY ("EPA").

5. CHANGES IN PROPERTY USE

Before making changes in the use of the Protected Property, the Declarants, or their successors and assigns, shall notify EPA and provide EPA with the opportunity to confer regarding the proposed changes to determine the effect of such changes on the conservation values of the Protected Property. EPA shall have the right to approve such changes in use if they do not impair or impede the conservation values of the Protected Property or the purpose of this Declaration, or to disapprove such changes. Such approval or disapproval shall be in writing and shall not to be unreasonably withheld. Changes will take effect upon recording in the official records of Franklin County, Vermont. The Declarants have no right or power to make any change that would limit the term or result in termination or limitation of this Declaration.

6. ENVIRONMENTAL CONDITION OF PROTECTED PROPERTY

The Declarants warrant and represent that to their knowledge after appropriate inquiry and investigation: (a) the Protected Property described herein is and at all times hereafter will continue to be in full compliance with all federal, state and local environmental laws and regulations, and (b) as of the date hereof there are no hazardous materials, substances, wastes, or environmentally regulated substances (including, without limitation, any materials containing asbestos) located on, in or under the Protected Property or used in connection therewith, and that there is no environmental condition existing on the Protected Property that may prohibit or impede use of the Protected Property for the purposes set forth in the Recitals.

7. CONTROLLING LAW

The interpretation and performance of this Declaration shall be governed by the laws of the State of Vermont and the United States, as applicable. This Declaration shall be liberally construed to effect the purpose of this Declaration.

ARTICLE III. ENFORCEMENT & REMEDIES

A. This Declaration is intended to ensure continued compliance with supplemental environmental project conditions embodied in the Consent Decree entered in the Federal District Court for the District of Vermont, Docket No. ____, and dated ____, 2008, to resolve Declarants' violation of the Clean Water Act, and the restrictions in this Declaration may be enforced by the United States of America in conjunction with its enforcement of that Consent Decree.

B. EPA shall have the right (under the Clean Water Act and as provided in the Consent Decree), in a reasonable manner and at reasonable times, after giving reasonable notice to the Declarants, or their successors or assigns, to enter the Protected Property to ensure compliance with this Declaration. EPA shall also have the right (under the Clean Water Act and

as provided in the Consent Decree), to take all actions to enforce the Consent Decree in Court, including but not limited to the right to require the Protected Property to be restored to its previous condition.

C. Nothing herein shall be construed to limit EPA's ability to exercise its authority pursuant to applicable law, including bringing an action against the Declarants pursuant to such law. However, this Declaration does not permit EPA to bring an action against the Declarants or their successors or assigns for any changes to the Protected Property due to causes beyond the Declarants' control, such as changes resulting from "acts of God," "acts of war," unauthorized wrongful acts of a third party, or any prudent action taken by the Declarants under emergency conditions to prevent, lessen, or remedy significant injury to the Protected Property resulting from such causes.

D. EPA's discretionary decision not to enforce the terms of this Declaration will not be construed as a waiver of its right to enforce the Declaration. EPA does not waive or forfeit the right to take action to ensure compliance with the Declaration by any prior failure to act.

ARTICLE IV. MISCELLANEOUS

A. If any provision of this Declaration or its application to any person or circumstance is found to be invalid, the remainder of the provisions of this Declaration, and its application to other persons or circumstances, shall not be affected.

B. Any notice, demand, request, consent, approval or any other communication that either party desires to give to the other regarding the Protected Property shall be in writing and shall be sent via certified mail addressed as follows:

To Declarants:

Mark and Amanda St. Pierre
[Address]

To United States:

U.S. Environmental Protection Agency, Region I
Wetlands Enforcement Section
One Congress Street
Boston, MA 02114

C. Any notice, demand, request, consent, approval or any other communication regarding the Protected Property, between EPA and other persons to whom the Protected Property may be transferred, leased or sold, shall be in writing and shall be sent via certified mail to the addresses identified above and in paragraph 4, above.

IN WITNESS WHEREOF, the Declarants have hereunto set their hand and seal, the day and year first above written.

[SIGNATURES]

ATTACHMENTS:

Exhibit A - a perimeter map of the Protected Property

Exhibit B - a perimeter deed description of the Protected Property

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK and AMANDA ST. PIERRE,

Defendants.

Civil Action No. 1:08-cv-177

CERTIFICATE OF SERVICE

I, Diane Barcomb, Legal Assistant for the United States Attorney's Office for the District of Vermont, do hereby certify that on September 3, 2008 I electronically filed the **Notice of Lodging Proposed Consent Decree and proposed Consent Decree** with the Clerk of the Court using the CM/ECF system. I hereby certify that on September 3, 2008, I have mailed by United States Postal Service, the document(s) to the following:

William R. Brooks, Esq.
2 Federal Street, Suite 115
St. Albans, VT 05478

Dated and signed at Burlington, Vermont this 3rd day of September, 2008.

/s/ Diane Barcomb
DIANE BARCOMB
U.S. Attorney's Office
P.O. Box 570
Burlington, VT 05402